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**DECEPTION AND DISCLOSURE: A
SOCIO-LEGAL ANALYSIS OF HIV
TRANSMISSION OFFENCES AND
MOBILE DATING APPLICATIONS**

C A R GILES

PhD

2021

DECEPTION AND DISCLOSURE: A SOCIO-LEGAL ANALYSIS OF HIV TRANSMISSION OFFENCES AND MOBILE DATING APPLICATIONS

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A thesis submitted in partial fulfilment of
the requirements of the University of
Northumbria at Newcastle for the
degree of Doctor of Philosophy

Research undertaken in the Faculty of
Business and Law

January 2021

Abstract

In England and Wales, the criminalisation of disease transmission has principally arisen in cases involving HIV transmission. This includes *Rowe [2018]* where intentional transmission was established for the first time, in part through digital evidence. Criminal law scholarship on transmission offences has acknowledged that issues of HIV (non-)disclosure can be contentious, presenting particular challenges stemming from various disclosure expectations and understandings of HIV transmission risk which exist in different contexts/communities.

Such issues have been compounded by the proliferation of HIV disclosure features on mobile “dating” applications targeted at men who have sex with men in recent years. How these new technologies influence and supplant existing expectations, knowledge of risk, and distributions of responsibility is an issue which has yet to be considered in empirical socio-legal literature. Utilising a visual, scenario-driven, methodology, this project analyses the responses of 102 application users who use these apps to connect with men and demonstrates that these features are understood in several complex and often contradictory ways.

Firstly, this thesis illustrates how participants’ conceptualisations of risk and safety might challenge existing approaches to “sexual responsibility” and the uneven distribution of responsibility for HIV prevention. Secondly, it highlights how contextual disclosure expectations and the perceived “right to know” have the potential to influence legal debates on “conditional consent”. Thirdly, it demonstrates how discourses on responsibility and agency, as well as participants’ often erroneous understanding of the law, are shaped by these disclosure features.

This thesis, therefore, makes a significant and original contribution to criminal law scholarship. It emphasises the importance of proper appraisal of contextual norms and knowledge in transmission cases and concludes by summarising that whilst applications offer new ways to understand culpability, responsibility and obligation in transmission cases, this can only be achieved justly through a detailed examination of social context in which these are used, which is not achieved if applications are presented as straightforward and unnuanced at trial.

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Acknowledgements

As an undergraduate, I was fortunate to benefit from the expertise of many of Northumbria's academics, including several who I would later call colleagues, mentors, and friends. Their support, advice and encouragement resulted in my decision to pursue postgraduate studies at the University of York, where I received further guidance and inspiration from staff and fellow students.

During my time at York, I saw an advertisement for a studentship back at Northumbria, under the supervision of Prof. Chris Ashford, who had taught on the Gender, Sexuality and Law module I had taken two years prior. That module, including its discussion of HIV transmission offences, had been thought provoking. In the time since, I had observed the widespread introduction of HIV disclosure features on mobile dating applications and I was inquisitive about the legal implications of online disclosure and non-disclosure using these tools.

I must particularly thank Prof. Ashford, not only for his extensive guidance and support as he has supervised this project, but also for the conversations which took place regarding that initial advertisement. I simply would not have had the confidence or the wherewithal to have applied without this. I am also indebted to Northumbria University for the studentship I was subsequently awarded and for providing a supportive and nurturing environment over the past three years.

I would especially like to thank staff members at Northumbria who have guided me since I returned to Northumbria. Laura Graham and Guido Noto La Diega have both been amazingly generous with their advice and supervision over the course of my studies and I am grateful to so many other staff who have taken time to discuss issues, read drafts, and comment on papers and presentations. I'm also indebted to the University library for dealing with my many interlibrary loan requests and other queries.

I am similarly thankful for the family and friends who kept with me throughout this process. To each and every one, I owe more than I can hope to convey here.

Finally, I would like to thank the participants who gave their time to this project. I cannot do justice to their contribution in these acknowledgements, but I hope that this work as a whole will do so.

Declaration

I declare that the work contained in this thesis has not been submitted for any other award and that it is all my own work. I also confirm that this work fully acknowledges opinions, ideas and contributions from the work of others.

Any ethical clearance for the research presented in this thesis has been approved. Approval has been sought and granted by the Faculty Ethics Committee on October 3rd, 2018.

I declare that the Word Count of this Thesis is 80,033 words

Name: Cameron A R Giles

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Date:

Chapter 1: Introduction

This thesis addresses the interrelationship of social, ethical and legal obligations relating to HIV disclosure and non-disclosure. Specifically, it questions whether the legal framework through which HIV is criminalised in England and Wales might be informed and developed in light of context dependent expectations and knowledge relating to the use of online mobile dating applications. Contemporary understanding of criminal legal theory has recognised that the criminal law has a social character, which cannot ‘exist prior to, or independently from, the social contexts in which it is found’.¹ In relation to sexual offences, O’Malley and Hoven point out that this social context shapes the meaning of gestures and other acts, which may distinguish legitimate, informed consent from its illegitimate foil.² Similarly, in relation to HIV transmission offences, context may shape the meaning of relevant legal concepts – such as risk, disclosure and responsibility. Consequently, it is possible to take account of the ‘rich tapestry of responsibility (and other normative) practices’ which might inform the criminal law,³ and present a socio-legal analysis of HIV transmission offences which identifies the influences online mobile dating applications may have.

Focusing upon offences which are concerned with the transmission, or risk of transmission, of HIV is not only a reflection of the particularly complex interrelationship of obligations, expectations and understandings seen in this

¹ Arlie Loughnan, *Self, Others and the State: Relations of Criminal Responsibility* (Cambridge University Press 2019) 27–28; drawing on Scott Veitch, *Law and Irresponsibility: On the Legitimation of Human Suffering* (Routledge-Cavendish 2007) 28–29.

² Tom O’Malley and Elisa Hoven, ‘Consent in the Law Relating to Sexual Offences’ in Kai Ambos and others (eds), *Core Concepts in Criminal Law and Criminal Justice* (Cambridge University Press 2019) 155.

³ Peter Cane, *Responsibility in Law and Morality* (Hart 2002) 13.

context. It is also, in part, an acknowledgement that the criminalisation of HIV transmission continues to be one of the 'great debates in criminal law'.⁴ Since the emergence of HIV/AIDS nearly 40 years ago, the role and function of the criminal law in respect of HIV transmission has been the subject of significant academic debate and legal analysis.⁵ In England and Wales specifically, these issues were redefined once precedents established in *Dica*⁶ and *Konzani*⁷ established a framework through which the reckless transmission of HIV was criminalised via s.20 of the Offences Against the Person Act 1861.⁸

Central to many of these discussions has been the influence of social and contextual expectations of HIV disclosure between (prospective) sexual partners. Several legal scholars – including Spencer, Slater, and others – have argued that, in certain circumstances, such expectations lend weight to arguments in favour of the criminalisation of HIV transmission because there is a moral wrong in the 'betrayal of legitimate expectations and the exploitation of vulnerability within the context of a certain kind of relationship.'⁹

Although there is an emphasis on the moral and ethical evaluation of people living with HIV in such arguments, rather than on specific legal determinations, these

⁴ Jonathan Herring, *Great Debates in Criminal Law* (4th Edn, Red Globe Press 2020) 72–86.

⁵ Matthew Weait, *Intimacy and Responsibility: The Criminalisation of HIV Transmission* (Routledge-Cavendish 2007) 1, 21–27; James Chalmers, 'Disease Transmission, Liability and Criminal Law' in AM Viens, John Coggon and Anthony S Kessel (eds), *Criminal Law, Philosophy and Public Health Practice* (Cambridge University Press 2013) in particular, at 136-128.

⁶ *R v Dica* [2004] EWCA Crim 1103.

⁷ *R v Konzani (Feston)* [2005] EWCA Crim 706.

⁸ See Chalmers (n 5) 139; Samantha Ryan, 'Disclosure and HIV Transmission' (2015) 79 *The Journal of Criminal Law* 395, 396.

⁹ James Slater, 'HIV, Trust and the Criminal Law.' (2011) 75 *Journal of Criminal Law* 309, 318; See also, JR Spencer, 'Liability for Reckless Infection Pt 1' (2004) 154 *New Law J* 384; JR Spencer, 'Liability for Reckless Infection Pt 2' (2004) 154 *New Law J* 448; John Flaherty, 'Clarifying the Duty to Warn in HIV Transference Cases' (2008) 54 *Criminal Law Quarterly* 60.

arguments remain of consequence to legal decision making. As Ryan has recently pointed out, the influence such arguments might have in respect of the distinction between “active deception” and mere “non-disclosure” of HIV status is significant.¹⁰ Ryan argues against criminalisation, other than in cases of “active deception”, on the grounds that voluntarily engaging in higher risk activities (as condomless sex with a partner of unknown status might be categorised) incorporates consent to that risk transpiring from those activities.¹¹ This position is not universal, however, and many have emphasised that a link does exist between social obligations, or what Farmer terms obligations of civility, and forms of criminal responsibility.¹² In light of this, analysing how obligations and expectations operate and are understood by those involved with them takes on an additional significance, beyond being an important example of understanding the social context in which the law operates.

In this thesis, such issues are investigated in a particular context – namely, the *online* disclosure and non-disclosure of HIV status via features dedicated for this purpose on mobile dating apps. Internet enabled location-aware dating apps emerged in the mid to late 2000s and utilise the technical capabilities of modern smartphones, tablets and other devices with GPS or location tracking functionality to connect users with one another, primarily on the basis of proximity between users. This design, which has resulted in the label ‘people-nearby applications’,¹³ is predicated on interaction between users who are online at, or

¹⁰ Samantha Ryan, “‘Active Deception’ v Non-Disclosure: HIV Transmission, Non-Fatal Offences and Criminal Responsibility” [2019] *Criminal Law Review* 4.

¹¹ Ryan (n 10) 18–19.

¹² Lindsay Farmer, ‘Civility, Obligation and Criminal Law’ in Daniel Matthews and Scott Veitch (eds), *Law, Obligation, Community* (Routledge 2018) 226–227.

¹³ See, for example, Eran Toch and Inbal Levi, ‘Locality and Privacy in People-Nearby Applications’ [2013] *UbiComp* 539; Chad Van De Wiele and Stephanie Tom Tong, ‘Breaking

about, the same time as one another. User created profiles, and the images and information on them, therefore play a significant role in facilitating initial interaction between users who are otherwise strangers.¹⁴ Recently, particularly in the latter half of the 2010s, features specifically intended to facilitate HIV status disclosure between users became prevalent across many popular dating apps. This included the nearly ubiquitous *Grindr* and a number of popular, but slightly less well known, applications such as *Hornet*.¹⁵ Such features were already commonplace on several dating websites and these dedicated HIV disclosure features share many commonalities with these precursors,¹⁶ contrasting with a more limited range of applications which discuss prevention techniques rather than disclosure.¹⁷ However, the ongoing popularity of dating applications in particular lends a certain significance to the impact of these features as they exist on applications. This significance might be compared to the ongoing debate over the potential link between the use of applications and increased rates of STI

Boundaries : The Uses & Gratifications of Grindr' [2014] 2014 ACM International Joint Conference on Pervasive and Ubiquitous Computing 619.

¹⁴ Jeremy Birnholtz and others, 'Identity, Identification and Identifiability', *Proceedings of the 16th international conference on Human-computer interaction with mobile devices & services* (2014); Colin Fitzpatrick, Jeremy Birnholtz and Jed R Brubaker, 'Social and Personal Disclosure in a Location-Based Real Time Dating App', *48th Hawaii International Conference on System Sciences* (2015).

¹⁵ See Grindr LLC, 'New to Grindr Profiles: HIV Status and Last Test Date Fields' (9 November 2016) <web.archive.org/web/20161115044007/www.grindr.com/blog/new-grindr-profiles-hiv-status-last-test-date/> accessed 26 August 2019; and, also, Hornet Networks, 'With Hornet, Gays Can Now Play Safe on Gay Mobile Social Networks' (*PR Newswire*, 20 January 2012) <www.prnewswire.com/news-releases/with-hornet-gays-can-now-play-safe-on-gay-mobile-social-networks-137800183.html> accessed 26 August 2019.

¹⁶ Kane Race, 'Framing Responsibility: HIV, Biomedical Prevention, and the Performativity of the Law' (2012) 9 *Journal of Bioethical Inquiry* 327; Brandon Andrew Robinson, 'Doing Sexual Responsibility: HIV, Risk Discourses, Trust, and Gay Men Interacting Online' (2018) 61 *Sociological Perspectives* 383; Cameron Giles, 'Digital Disclosure: HIV Status, Mobile Dating Application Design and Legal Responsibility' [2020] *Information and Communications Technology Law*.

¹⁷ For instance, Scruff, see Chase Ledin and Kristian Møller Jørgensen, 'Viral Hauntology', *Viral Masculinities* (Exeter Masculinities Research Unit 2020).

transmission, as well as whether any such link is correlative or causative, itself a highly contested socio-medical issue.¹⁸

The objectives of this thesis might therefore be summarised as two-fold. Firstly, this work aims to establish what disclosure expectations exist on mobile dating apps and to explore how such expectations relate to, impede or extend beyond legal concepts found in the existing literature on the criminalisation of HIV transmission. Secondly, it seeks to present a socio-legal analysis of the present state of HIV transmission offences in England and Wales and to discuss how digital evidence, taken from dating apps, might offer new ways of evaluating legal and ethical culpability. This is summarised in the research question:

How are HIV disclosure features on dating apps understood, and how might these context dependent understandings shape the criminalisation of HIV transmission in England and Wales?

In reaching a conclusion to this question, I argue that digital technology has the potential to provide an insight into areas of life which hitherto were regarded as private, with offences relating to sex and sexuality being a prime example of this.¹⁹ I go on to argue, however, that there is a risk that such evidence may be presented *uncritically* during criminal proceedings and that this may misrepresent the nuanced, complicated and multifaceted ways in which these features are employed and understood by dating application users themselves. In

¹⁸ cf. Eric Rice and others, 'Sex Risk among Young Men Who Have Sex with Men Who Use Grindr, a Smartphone Geosocial Networking Application' (2012) 3 Journal of AIDS and Clinical Research; Matheus Almeida, Jo Gibbs and Claudia Estcourt, 'Are Geosocial Networking (GSN) Apps Associated with Increased Risk of STIs & HIV: A Systematic Review' (2016) 92 Sexually Transmitted Infections A19; Melissa Cabecinha and others, 'Finding Sexual Partners Online: Prevalence and Associations with Sexual Behaviour, STI Diagnoses and Other Sexual Health Outcomes in the British Population' [2017] Sexually Transmitted Infections 1.

¹⁹ Jessica Parker, 'Sex, Texts and Disclosure' (2018) 182 Criminal Law & Justice Weekly 25; Heather R Hlavka and Sameena Mulla, "'That's How She Talks': Animating Text Message Evidence in the Sexual Assault Trial' (2018) 52 Law and Society Review 401.

demonstrating this point, I draw on qualitative empirical data, collected via an online survey using visual elicitation methods and present an analysis of the 102 participants who took part in this research.

1.1 Significance, Originality and Contribution to Knowledge

This piece makes a significant and original contribution to socio-legal criminal law scholarship through its critical appraisal of the current legal framework surrounding HIV transmission in England and Wales by demonstrating how context specific norms might inform the law in this area. It highlights how legal concepts as well as concepts relevant to legal decision making, such as recklessness and risk, consent and disclosure, and responsibility, may be narrower and less nuanced than the ways in which these concepts are understood by those using or engaging with HIV disclosure features on dating apps. It makes a specific contribution to scholarship in three main areas: methodology; analysis of collected data; and legal analysis.

Methodologically, this piece contributes to the growing field of literature addressing the use of online recruitment and data collection techniques. It does so through its development of the “visual vignette” – an approach which builds upon existing story completion methods and research employing visual elicitation techniques. As outlined in Chapter 2, the increased availability of online research tools and the ease with which visual stimuli can be incorporated into online data collection methods continues to provide new ways to conduct qualitative empirical research. For projects such as this one, where there is an emphasis on participants’ understanding of an inherently visual, but sensitive, issue such as dating application profiles, the visual vignette offers an alternative to approaches

(for instance, the “digital walkthrough”)²⁰ which may have ethical limitations relating to informed consent or privacy.

Through the analysis of the data collected in this project, I demonstrate several limitations of key legal concepts relating to HIV transmission criminalisation. Throughout the analysis presented in Chapters 4-6, I discuss the extent to which the criminal law is understood in terms of the ‘self-determining moral agent, equipped with distinctive cognitive and volitional capacities of understanding and self-control’²¹ and highlight how participants’ understandings of what is meant by risk, safety and consent may not concord with the legal approach to these concepts. In Chapter 4, I highlight how certain legal concepts are understood to have a universal relevance, detached from spatial and temporal influences,²² which contrasts with the ways in which these concepts were discussed by participants. In Chapter 5, I then go on to discuss the relationship between participants’ framework of consent and trust and the analysis of conditional consent and the act/omission distinction in criminal law literature. In this chapter, I go on to argue that the legal framing of disclosure and non-disclosure might be re-examined in light of participants’ accounts.

Throughout this thesis, I present a socio-legal analysis of the evidence that might be taken from mobile dating applications and the influence this may have on criminal proceedings relating to HIV transmission or the non-disclosure of HIV

²⁰ Kath Albury and others, ‘Data Cultures of Mobile Dating and Hook-up Apps: Emerging Issues for Critical Social Science Research’ (2017) 4 *Big Data & Society* 1.

²¹ Nicola Lacey, ‘Responsibility and Modernity in Criminal Law’ (2001) 9 *Journal of Political Philosophy* 249, 251.

²² Lacey (n 21); Lindsay Farmer, ‘Time and Space in Criminal Law’ (2010) 13 *New Criminal Law Review* 333.

status. Although I focus on the concepts relevant to the analysis of evidence taken from dating applications, rather than evidential rules of admissibility or exclusion; the analysis I present of the former provides a foundation for future work on the latter, whilst also addressing other relevant aspects of HIV criminalisation. In Chapter 2, I discuss how the criminalisation of HIV transmission is often justified, as I have mentioned above, through reference to perceived breaches of social obligations and norms of “sexual responsibility”. Furthermore, I assess the emerging concept of “sexual fraud” and how HIV transmission offences relate to and may draw on the literature developed from gender deception cases of recent years.²³ In later chapters, having demonstrated the narrow simplicity of several of the concepts underpinning sexual responsibility and sexual fraud, I argue that the tendency to present sexual and legal *responsibility* as coherent – rather than various inconsistent and perhaps conflicting *responsibilities* – is in part responsible for a perceived “duty to disclose” HIV status which can sometimes be observed in legal literature.²⁴ I go on to argue that claims that non-disclosure *is* analogous to active deception can be linked to this deployment of responsibility in legal and moral discourse.²⁵

It should also be pointed out that significant developments in the criminalisation of HIV transmission have occurred since the initial conception of this project. In 2017, Daryll Rowe was the first person in England and Wales to be convicted of intentionally infecting another person with HIV.²⁶ As one of the first major pieces

²³ Alex Sharpe, ‘Expanding Liability for Sexual Fraud Through the Concept of ‘Active Deception: A Flawed Approach’ (2016) 80 *The Journal of Criminal Law* 28.

²⁴ On this potential duty, see Weait (n 5) 191; Ryan (n 8) 399.

²⁵ As Ryan points out, *EB* establishes that this is not the case, see Ryan (n 10) 4; and, *R v EB* [2006] EWCA Crim 2945.

²⁶ Rowe was also convicted in Scotland where there is a similar but distinctive framework of HIV transmission offences. To be clear about the limitations of this project, I should state that I do not

of socio-legal research in the wake of *Rowe*, this thesis also includes some analysis of the decision in that case, where digital evidence, albeit predominantly taken from direct messages rather than application profiles, played a significant role in establishing Rowe's intent. It is argued that, although a major development in the history of disease transmission criminalisation, *Rowe* leaves several issues unaddressed and presents some new concerns which future case law may need to consider.

1.2 Thesis Structure

This thesis consists of five core chapters, supplemented by this introduction and a final concluding chapter. My arguments proceed as follows:

1.2.1 Chapter 2

In Chapter 2, I present an overview of the existing literature addressing the criminalisation of HIV transmission in England and Wales and situate this thesis within the broader context the literature establishes. I begin by outlining the historic non-criminalisation of STI transmission before going on to discuss the academic and policy debate which occurred following the emergence of the HIV/AIDS epidemic in the early 1980s. Within this chapter, I pay particular attention to the Law Commission and Home Office consultations which took place in the 1990s and discuss the extent to which these set the stage for the landmark cases of *Dica* and *Konzani* in the early 2000s.

consider the specifics of the Scots Law on HIV transmission, *which includes separate provisions on exposure where transmission does not occur*, in this work. See *R v Rowe* [2018] EWCA Crim 2688.

Considering the legal and academic aftermath of these two cases, I go on to suggest that the criminalisation of HIV transmission continues to be justified through reference to obligations of responsibility, risk management and trust. I argue that these concepts are often overly simplistic and, moreover, that they are under-explored in socio-legal literature – often being equated to norms of sexual responsibility and citizenship. Turning to recent case law, I discuss the emerging concept of *sexual fraud* and its relevancy in HIV transmission cases. In the final stages of this chapter, I then turn to the distinction, or lack of distinction, between non-disclosure and deception, making particular mention of *Rowe* and the impact of the decision in that case going forwards.

1.2.2 Chapter 3

Having demonstrated a gap in the existing literature on HIV transmission offences, in Chapter 3 I set out the methodological framework underpinning this work and discuss the specific methods used in this project to address this literature gap. Chapter 3 begins by setting out three methodological themes: scenario and context driven research; visual research techniques; and, the internet as a site of research. Each of these themes is central to the approach taken here and following this overview I go into detail about the development of the online, visual, scenario driven data collection survey developed here.

After discussing the design of the stimuli material, the recruitment process and the specific ethical concerns I anticipated and how these were addressed, I then provide an account of carrying out recruitment and data collection. Following this, I discuss the process of preparing responses for analysis and conducting the analysis itself. In this chapter, I also outline some of the limitations that exist as a

consequence of my theoretical framework, as well as the developments that have transpired in terms of application features and design since data collection took place.

1.2.3 Chapter 4

Chapter 4 is the first of three analysis chapters and is titled: 'Risk, Safety and Other Core Concepts'. This chapter explores several themes underpinning the analysis in subsequent chapters. As I will explain when discussing my theoretical framework in Chapter 3, Chapter 4 draws on Valverde's theory of chronotopic legal analysis in order to demonstrate how several of the concepts discussed by participants were dependent upon different ways of understanding space and time.²⁷

I argue that *risk*, one of the central themes developed using the data, as well as the related theme of *safety*, can be understood as operating at two different scales and tempos. Whereas the manner in which participants discussed risk possessed a chronological, linear narrative; this contrasted with safety which had a cyclical, ongoing quality. I suggest that this distinction plays a significant role in the distinct obligations and attitudes which risk and safety are discussed as producing within the data.

In particular, in the latter half of Chapter 4, I discuss how stigmatising behaviours and attitudes – including the avoidance of people living with HIV on dating apps – were discussed by participants. I argue that these practices might be examined

²⁷ Mariana Valverde, *Chronotopes of Law: Jurisdiction, Scale and Governance* (Routledge 2015).

in light of the differences in scale and tempo seen in risk and safety. This section argues that HIV transmission risk, disclosure and non-disclosure, and other knowledge and expectations discussed by participants might be understood as being as much about men 'feeling safe' as they are about practices of safety and risk reduction.²⁸ This chapter then concludes with a brief observation linking this discussion of tempo and temporality with later discussion about sexual responsibility and the distribution of responsibility for preventing HIV transmission between sexual partners.

1.2.4 Chapter 5

Entitled 'Consent, Disclosure and Trust', Chapter 5 analyses participants' understanding of disclosure and consent. It critiques claims that certain facts, such as HIV status, are "material" to consent or that consent can be made "conditional" upon expected facts or presumptions made by prospective sexual partners. In analysing the distinction between acts and omissions as they exist in this context, I draw upon literature exploring the socio-cultural narratives surrounding sex and HIV status disclosure which I explore in Chapter 2. I argue that conditional consent arguments rely upon assumptions about the social context and normative practices of HIV disclosure which are presumed to exist universally. I suggest that where some argue that non-disclosure is comparable to active deception, or otherwise to a sufficiently serious breach of trust to warrant

²⁸ This point draws upon the work of Bourne and Robson, who also argue that practical experience of "safe" sex has an emotive element which must be considered. See Adam H Bourne and Margaret A Robson, 'Perceiving Risk and (Re)Constructing Safety: The Lived Experience of Having "safe" Sex' (2009) 11 Health, Risk and Society 283.

the imposition of the criminal law, that this represents the overextension of presumed moral ideas into the law.²⁹

Consequently, I argue that online mobile dating applications are poor tools for evidencing HIV disclosure and consent to the risk of HIV transmission. The additional probative value that juries might give to the (semi-)permanent record of HIV status disclosure and non-disclosure, therefore, appears to be unjustifiable. As part of this argument, I discuss the highly contractual understanding of consent which can be observed in some literature on HIV transmission. Here I discuss the presumed “right to know” which was mentioned by some participants and the manner in which “consent talk”,³⁰ more generally, is ill-suited to respond to the wider socio-cultural factors which can and do influence HIV transmission. I argue that application evidence may appeal to jurors because it may be presumed to be “objective” and detached from the passionate, emotive and sexualised context of disclosure, which should instead cause us to question its usefulness as a tool in legal decision making.

1.2.5 Chapter 6

In the final analysis chapter, titled ‘Legal, Social, and Moral Responsibilities’, I address the legal and non-legal forms of responsibility discussed by participants and return to the trend of “responsibilisation” in discourse on HIV prevention, which I will introduce below in Chapter 2. Drawing on socio-legal literature, this

²⁹ On which, see Cane (n 3) 15–16.

³⁰ Joseph J Fischel, *Screw Consent: A Better Politics of Sexual Justice* (University of California Press 2019) 18.

chapter challenges individualistic constructions of sexual responsibility.³¹ Building on the discussion of disclosure in Chapter 5, in this chapter I argue that perceived disclosure obligations demonstrate that there is a tendency to construct legal and sexual responsibility in a manner closely associated with ideals of personal autonomy. To further demonstrate this point, I highlight how many participants discussed positive obligations of HIV status disclosure, in some instances independent of any actual transmission risk, and go on to discuss how these accounts highlighted the importance of themes such as rationality and individualism observed in the data.

Chapter 6 also notes how ethical issues relating to HIV disclosure are often presented as uncontroversial or otherwise uncontested, even where the challenges of legal rights and duties are extensively debated.³² It suggests that these assumptions surrounding sexual ethics shape interpretations of deception and non-disclosure, as discussed in the previous chapters. Building on this point, it demonstrates how legal responsibility for HIV prevention and status disclosure were only partially understood by some participants and were, in some instances, misunderstood by others, supporting the findings of Dodds, Bourne & Weait and Phillips & Schemeri.³³

³¹ Diana Young, 'Individual Rights and the Negotiation of Governmental Power' (2015) 24 *Social & Legal Studies* 113.

³² Sharon Cowan, 'Offenses of Sex or Violence? Consent, Fraud, and HIV Transmission' (2014) 17 *New Criminal Law Review* 135.

³³ Catherine Dodds, Adam Bourne and Matthew Weait, 'Responses to Criminal Prosecutions for HIV Transmission among Gay Men with HIV in England and Wales' (2009) 17 *Reproductive Health Matters* 135; Matthew D Phillips and Gabriel Schembri, 'Narratives of HIV: Measuring Understanding of HIV and the Law in HIV-Positive Patients' (2016) 42 *Journal of Family Planning and Reproductive Health Care* 30.

Chapter 6 concludes by reiterating the link between legal doctrines of responsibility and perceived (non-legal) obligations surrounding HIV disclosure and non-disclosure. Here, I return to the evolving concept of “sexual fraud” and suggest that evidence taken from mobile dating apps might have an additional effect on the future deployment of this concept. I emphasise, however, that if it does then care should be taken to ensure that the legal distinctions between non-disclosure and deception continue to be observed.

1.2.6 Chapter 7

Following Chapter 6, I return to the broader, and I would emphasise ongoing, debate over the criminalisation of HIV transmission and re-examine it in light of the analysis presented across the preceding chapters. I argue that although mobile dating applications offer a new and adaptable way to consider issues relating to the criminalisation of HIV transmission, there is significant scope for such evidence to be used to frame legal responsibility around social expectations of *good, responsible* sexuality which is individualistic, moralistic and unevenly distributed.³⁴ I argue that the uncritical presentation of evidence taken from mobile dating applications, which does not acknowledge the particularities of the social context in which this evidence is produced, is unlikely to improve upon the current flawed framework of HIV transmission criminalisation. If data taken from applications is to evidence the nuanced and sometimes contradictory ways in which those who are active on these applications use and understand these new

³⁴ See Chris Ashford, ‘Bareback Sex, Queer Legal Theory, and Evolving Socio-Legal Contexts’ (2015) 18 *Sexualities* 195.

disclosure features, it cannot simply become another way of establishing fault and “sexual fraud”.

1.3 Concluding Remarks

As I have detailed above, the aim of this thesis is to critically examine the current criminalisation of HIV transmission in England and Wales through an exploration of the evidentiary potential of profiles on mobile dating apps which make use of HIV disclosure features.

In achieving this aim, I demonstrate that participants’ understanding of HIV transmission risk, disclosure, and responsibility is shaped by the disclosure features now seen on dating applications in nuanced and contradictory ways. Over the following six chapters, I therefore argue that although evidence taken from mobile dating applications has the potential to significantly shape future HIV transmission trials, there should be significant concern over such evidence being presented to Courts and to juries as simple or straightforward.

Chapter 2: Literature Review

Since the emergence of the HIV/AIDS epidemic, nearly 40 years ago, there has been significant academic, legal, and popular debate on the issue of HIV criminalisation and the law's broader response to disease transmission. Some of the most significant and contentious debates within the existing literature have addressed the intersection and potential conflict between principles of criminal law and principles of public health as well as the law surrounding it.¹ Although, as Weait notes, different jurisdictions possess different legal frameworks through which the transmission, attempted transmission or mere non-disclosure of HIV status can be criminalised,² the fundamental concepts and principles of criminal law at the heart of these debates – concepts such as risk, disclosure, and responsibility – are common across many, if not most, jurisdictions.³

In particular, many of these debates can be summarised as a disagreement about the role of the law in HIV transmission cases. This is especially contentious in respect of the purposes of punishment in HIV criminalisation cases.⁴ In *Punishing Disease: HIV and the Criminalization of Sickness*, Trevor Hoppe notes such

¹ Matthew J Weait, 'Limit Cases: How and Why We Can and Should Decriminalise HIV Transmission, Exposure, and Non-Disclosure' (2019) 27 *Medical Law Review* 576; Jonathan Herring, *Great Debates in Criminal Law* (4th Edn, Red Globe Press 2020) 81–83.

² For a comparative analysis of HIV transmission offences in a number of jurisdictions, see David Hughes, 'Did the Individual Consent to the Risk of Harm? A Comparative Jurisdictional Analysis of Consent in Cases of Sexual Transmission/Exposure to HIV' (2018) 82 *The Journal of Criminal Law* 76.

³ Weait, 'Limit Cases: How and Why We Can and Should Decriminalise HIV Transmission, Exposure, and Non-Disclosure' (n 1) 577.

⁴ Leslie P Francis and John G Francis, 'Criminalizing Health-Related Behaviors Dangerous to Others? Disease Transmission, Transmission-Facilitation, and the Importance of Trust' (2012) 6 *Criminal Law and Philosophy* 47; Matthew Phillips and Ashish Sukthankar, 'Imprisonment for Non-Intentional Transmission of HIV: Can It Be Supported Using Established Principles for Justifying Criminal Sentencing?' (2013) 89 *Sexually Transmitted Infections* 276; Alex Woody and others, 'Motivations for Punishing Someone Who Violates HIV Nondisclosure Laws: Basic Research and Policy Implications' (2015) 15 *Analyses of Social Issues and Public Policy* 127.

debates in the context of the American criminal justice system. He demonstrates that socio-medical knowledge and understanding of HIV, its transmission and its prevention, are drawn on by lawyers in HIV transmission cases. This, he argues, enables lawyers to develop new ways of understanding relevant legal concepts such as harm, recklessness and wrongdoing and thus to justify the imposition of criminal culpability.⁵

Mathen and Plaxton have, similarly, observed that the criminal law relating to HIV in Canada faces challenges as a result of modern medical knowledge. They suggest that because the criminal law has, to date, focused upon risk in the context of transmission; the developments seen in the treatment and prevention of HIV should have a significant impact on the criminal law. Specifically, they suggest that these developments shift the construction of riskiness and the point at which transmission risk becomes *too significant* as to be non-dismissible by the criminal law.⁶ Likewise, in the English context, Phillips and Sukthankar have argued that these developments should have an impact, not only on the theoretical debates surrounding the punishment of offenders, but also practical criminal sentencing policy. Considering the theoretical justifications of punishment found in s.142 Criminal Justice Act 2003, which includes deterrence and rehabilitation,⁷ they highlight, for example, that: '[t]he concept of prevention is now more complex with the use of antiretrovirals to reduce viral load, and thereby reduce the risk of transmission, and the intention to adhere to effective

⁵ Trevor Hoppe, *Punishing Disease: HIV and the Criminalization of Sickness* (University of California Press 2018) ch 5.

⁶ Carissima Mathen and Michael Plaxton, 'HIV, Consent and Criminal Wrongs' (2011) 57 *Criminal Law Quarterly* 464, 476. Throughout I draw on international literature to highlight theoretical issues such as this, but, it is not my intention to undertake a comparative analysis in this work.

⁷ Criminal Justice Act 2003 s 142.

medication may be a marker of rehabilitation'.⁸ Whilst the statutory provisions that each of these authors are considering vary from jurisdiction to jurisdiction, the broader issue these debates are indicative of – the purpose and impact of the law's response to HIV transmission – has a common relevancy.

Nevertheless, it must also be recognised that there is a social and historic context specific to the current legal framework on HIV transmission in England and Wales. The transmission of a sexually communicable disease was, for a significant period, understood to *not* constitute a criminal offence – at least within the context of sexual relationships between husband and wife, which was similarly excluded from the law on rape.⁹ With the emergence of the HIV/AIDS epidemic, these existing principles came to be re-examined and re-evaluated.¹⁰ This chapter, therefore, explores and analyses the existing academic research and literature addressing HIV criminalisation, with particular reference to the development of the criminalisation of transmission in England and Wales. In some instances, it draws upon literature from other jurisdictions, but with a focus on the theoretical debates on the philosophy of criminal law and social context surrounding the HIV/AIDS epidemic, rather than a specifically comparative perspective. On a similar basis, I draw upon socio-medical literature which discusses the historic and contemporary knowledge of HIV transmission and

⁸ Phillips and Sukthankar (n 4) 277.

⁹ See *R v Clarence* (1888) 22 QBD 23; for discussion of *Clarence*, see, for instance, David Ormerod, 'Consent and Offences against the Person: Law Commission Consultation Paper No. 134' (1994) 57 *The Modern Law Review* 928, 936; Matthew Weait, *Intimacy and Responsibility: The Criminalisation of HIV Transmission* (Routledge-Cavendish 2007) 93–96; James Chalmers, 'Disease Transmission, Liability and Criminal Law' in AM Viens, John Coggon and Anthony S Kessel (eds), *Criminal Law, Philosophy and Public Health Practice* (Cambridge University Press 2013) 132–133, and further discussion below.

¹⁰ For examples of earlier work, see KJM Smith, 'Sexual Etiquette, Public Interest and The Criminal Law' (1991) 42 *Northern Ireland Legal Quarterly* 309; Peter Alldridge, 'Sex, Lies and the Criminal Law' (1993) 44 *Northern Ireland Legal Quarterly* 250.

prevention. This is done in order to demonstrate the specific realisation of broader debates, such as those discussed in the previous paragraph, within the English and Welsh context.

In this chapter, I illustrate how much of the existing literature that attempts to justify the criminalisation of HIV transmission relies upon particular concepts such as disclosure and trust, risk taking and personal autonomy, and consent and sexual responsibility. There is extensive literature on both the broader criminalisation debate and the specific influence of these concepts within the case law on HIV transmission in England and Wales. Nevertheless, I establish that there is a gap within this literature relating to the nature and influence of these concepts as they arise on mobile dating applications. Despite the depth of literature on transmission criminalisation, I demonstrate that addressing this literature gap prompts a broader re-examination of criminalisation, taking into consideration emerging concepts such as “conditional consent” and “sexual fraud”, which I introduce in this chapter.

This chapter is organised into nine subsequent sections. In the first two sections, I outline the debate which preceded and then developed alongside the cases of *Dica* and *Konzani*. These sections argue that this early case law imposed an imbalanced framework of responsibility in relation to the prevention of HIV transmission. I suggest that this has resulted in several issues which remain unresolved, including the impact of unilateral risk reduction and the culpability of defendants who have not been diagnosed as HIV+.¹¹ Furthermore, I highlight the

¹¹ Damian Warburton, ‘A Critical Review of English Law in Respect of Criminalising Blameworthy Behaviour by HIV+ Individuals’ (2004) 68 *The Journal of Criminal Law* 55; David Hughes, ‘The

significant role that prosecutorial discretion inhabits following these judgments and highlight how this makes understanding the social context within which the law operates all the more important. In the third and fourth sections, I explore recent developments in the detection, treatment and prevention of HIV and link these developments to the ongoing debates over criminalisation. In the fifth section, I introduce the concept of *responsibilisation* and demonstrate its relevance to trends in criminalisation and debate over the function of the law.

HIV transmission offences do not exist in isolation and there have been a number of significant developments in recent years surrounding the issue of alleged deception in the context of sexual relationships. The concept of “sexual fraud” has emerged within the literature analysing cases which involve alleged deceptive behaviour relating to gender identity.¹² In the sixth section below, I echo and build upon the arguments of Samantha Ryan,¹³ demonstrating the relevance of this literature to the analysis of HIV transmission offences. Discussion of “sexual fraud” also has a relevance to the seventh section of the chapter, where I illustrate how HIV transmission offences are exemplary of debates surrounding the act/omission distinction in theories of criminal law.¹⁴ Following on from this, in the final parts of this chapter, I return to the case of *Rowe* introduced in Chapter

Criminal Transmission of HIV: Issues with Condom Use and Viral Load’ (2014) 54 *Medicine, Science and the Law* 187; David Hughes, ‘Is It Really a Risk? The Parameters of the Criminalisation of the Sexual Transmission/Exposure to HIV’ (2020) 84 *The Journal of Criminal Law* 191.

¹² Alex Sharpe, ‘Criminalising Sexual Intimacy: Transgender Defendants and the Legal Construction of Non-Consent’ [2014] *Criminal Law Review* 207; Alex Sharpe, ‘Sexual Intimacy, Gender Variance, and Criminal Law’ (2015) 33 *Nordic Journal of Human Rights* 380; Alex Sharpe, ‘Expanding Liability for Sexual Fraud Through the Concept of ‘Active Deception: A Flawed Approach’ (2016) 80 *The Journal of Criminal Law* 28; Alex Sharpe, ‘Queering Judgment’ (2017) 81 *The Journal of Criminal Law* 417.

¹³ Samantha Ryan, ‘“Active Deception” v Non-Disclosure: HIV Transmission, Non-Fatal Offences and Criminal Responsibility’ [2019] *Criminal Law Review* 4.

¹⁴ For an outline of the debates on this topic, see Herring (n 1) 25–37.

1. I outline some of the unresolved issues that *Rowe* failed to address or itself introduced. I argue that *Rowe* is a highly unusual case which does not provide a sound basis upon which to develop the criminal law going forward. Nevertheless, I demonstrate how the questions that *Rowe* does leave unanswered provide something of a foundation for the arguments made and analysis presented in the later chapters of this work.

2.1 Pre-*Dica*: Debate over Criminalising HIV Transmission Prior to 2003/4

2.1.1 19th Century Foundations: *Bennett*, *Clarence*, and Procurement by False Pretences

Responses to HIV from within and in respect of the law were limited during the early stages of the HIV/AIDS epidemic.¹⁵ Historically, the transmission of infectious diseases was understood as a public health concern, although it was theoretically possible for prosecutions to take place under statutes addressing public nuisance.¹⁶ Despite this, certain authorities on the issue of disease transmission do stand out across the late 19th century.¹⁷ In *R v Bennett*, heard in 1866, a defendant was convicted for assault in relation to a sexually transmitted infection passed to his niece.¹⁸ The direction of Willes, J. in that case emphasising that:

[A]lthough the girl may have consented to sleep, and therefore to have connexion with her uncle, yet, if she did not consent to the aggravated circumstances, *i.e.*, to connexion with a diseased man, and a fraud was

¹⁵ Jonathan Cooper and Doughty Street Chambers, 'Learning to Love Again: The Ghost of Viruses Past, Present and Future' (*OUTy Street Seminar*, 30 June 2020) <<https://www.youtube.com/watch?v=T5z1ZiFL1LQ>>.

¹⁶ Chalmers (n 9) 125.

¹⁷ Karl Laird, 'Criminal Law Review Rapist or Rogue? Deception, Consent and the Sexual Offences Act 2003' [2014] *Criminal Law Review* 492, 495–496.

¹⁸ *R v Bennett* (1866) 4 Foster and Finlason 1105; 176 ER 925.

committed on her, the prisoner's act would be an assault by reason of such fraud.¹⁹

Critically in *Bennett*, the defendant was charged with an assault rather than a sexual offence. This distinction would be of significant importance to distinctions made between *Bennett* and future cases involving sexual deception. Subsequently, in 1868, an appeal in *R v Barrow* found that 'even though [the complainant's] consent [was] obtained by fraud, the act does not amount to rape.'²⁰ *Barrow* along with other cases would, afterwards, go on to prove critical to the decision in *R v Clarence*,²¹ which set the scope of debate on the criminalisation of disease transmission for the next century.

Clarence established the principle that transmission of a sexually transmitted infection did not amount to an offence, at least within the context of marriage. The case involved transmission of gonorrhoea between Charles and Selina Clarence. As Gleeson states, in the decision of Court for Crown Cases Reserved: '[t]he physical harm to Selina was summarily dismissed as the primary concern, and the case was transformed into a lengthy discussion of the damning wider repercussions of allowing a wife to charge her husband with non-consensual sex.'²² Gleeson argues that this is indicative of a broader dismissal of certain harms and prioritisation of others in the CCCR's judgment.

¹⁹ *R v Bennett* (n 18) 1106.

²⁰ *R v Barrow* [1868] LR 1 CCR 156 156.

²¹ *R v Clarence* (n 9) 25. Although, it should also be noted that Barrow had received mixed judicial commentary before *Clarence*, in the case of *R v Flattery*, discussed below.

²² Kate Gleeson, 'Sex, Wives, and Prostitutes: Debating Clarence' in Judith Rowbotham and Kim Stevenson (eds), *Criminal Conversations: Victorian Crimes, Social Panic, and Moral Outrage* (Ohio State University Press 2005) 221.

Whilst the court took significant steps to dismiss the physical harm suffered by Selina,²³ Gleeson suggests that the Court also found the idea of drawing on the (traditionally commercial) principles of fraud in sexual offence cases 'dangerous, and plainly misguided'.²⁴ The approach to harm seen in *Clarence* was part of a broader understanding of harm seen during this time, which excluded the injuries in the absence of a physical assault.²⁵ This relatively narrow construction of inflicting grievous bodily harm facilitated the Court's decision to avoid constructing disease transmission as an assault, at least within the context of *sexual* transmission.²⁶ Although, as will be discussed below, *Clarence* is no longer good law in this respect, some observations made in the case continue to be relevant today. Specifically, as Stephen J observed, in disease transmission cases there is an uncertainty created as a result of the time elapsing between the point of transmission and the point at which symptoms become apparent or the infection is otherwise detectable.²⁷ Whereas in contemporary contexts this becomes an issue in respect of identifying the defendant and establishing causation, as discussed below – in 1888, Stephen J drew upon this point to dismiss the proposition that disease transmission constituted an assault. Moreover, this understanding of assault coincides with an understanding of rape

²³ See, for instance, the judgment of Stephen J in *R v Clarence* (n 9) 41.

²⁴ Gleeson (n 22) 224.

²⁵ Vanessa E Munro, 'On Responsible Relationships and Irresponsible Sex - Criminalising the Reckless Transmission of HIV *R v Dica* and *R v Konzani*' (2007) 19 *Child and Family Law Quarterly* 112, 114.

²⁶ This point is made at several points in the judgment in *Clarence*. Most prominently, by Wills, J. See *R v Clarence* (n 9) 37–38. Nevertheless, it might be noted that this does not preclude the prosecution of disease transmission where an assault is committed, for example, where a needle is used to commit an assault.

²⁷ *R v Clarence* (n 9) 45 (Stephen J).

dependent upon the use of force, which was prevalent in judicial decisions at the time and which persists in some jurisdictions.²⁸

The Court's concern that such principles would necessarily expose those participating in potentially *immoral* practice of *seduction*²⁹ demonstrates the ways in which the scope of harm was implicitly limited and simplified down to relatively narrow contexts which implicitly reflect the patriarchal, somewhat misogynistic attitudes of the period.³⁰ As Cooper and Reed note,³¹ the judgment had an ongoing influence over the construction and understanding of s.20 offences and broader legal concepts over the entirety of the 20th century. They note that it resulted in 'judges giving more general attention to what precisely was involved in the wife's consent, and the types of fraud which would and would not vitiate consent to a non-fatal "offence".'³² Consequently, *Clarence* continued to have relevance to the criminal law on disease transmission, as well as in relation to the marital rape exception, for over a century. In respect of the marital rape exception, this continued until the abolition of the exception through the case of *R v R* in 1991.³³

²⁸ Jed Rubenfeld, 'The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy' (2013) 122 *Yale Law Journal* 1372, 1396–1397.

²⁹ Gleeson (n 22) 228; Laird (n 17) 495–496.

³⁰ See, generally, Gleeson (n 22).

³¹ Simon Cooper and Alan Reed, 'Informed Consent and the Transmission of Sexual Disease: Dadson Revivified' (2007) 71 *Journal of Criminal Law* 461, 469–470.

³² Cooper and Reed (n 31) 469.

³³ *R v R* [1992] 1 AC 599, 618 (Lord Keith); for discussion of this point, see Adrian Williamson, 'The Law and Politics of Marital Rape in England, 1945–1994' (2017) 26 *Women's History Review* 382.

Furthermore, as Rubinfeld and Simpson both highlight,³⁴ the approach in *Clarence* is distinguishable from other cases such as *R v Flattery*.³⁵ This distinction is archetypal of the differentiation between fraud “in the inducement” and fraud “in the factum”,³⁶ the decision in *Flattery*, where the defendant was convicted of rape after misrepresenting the act of intercourse as a medical procedure and therefore misrepresenting the nature of the act,³⁷ being the latter.

Whereas, in *Clarence*, although the judgement explicitly queries whether:

the procurement of intercourse by suppressing the fact that the man is diseased is more nearly allied to the procurement of intercourse by misrepresentation as to who the man is or as to what is being done, or to a misrepresentation of a thousand kinds in respect of which it has never yet occurred to any one to suggest that intercourse so procured was an assault or a rape³⁸

ultimately, the judgment is reached on the basis that the deception was a fraud only in the inducement, Stephen J stating:

The woman’s consent here was as full and conscious as consent could be. It was not obtained by any fraud either as to the nature of the act or as to the identity of the agent. The injury was done by a suppression of the truth. It appears to me to be an abuse of language to describe such an act as an assault.³⁹

Two key aspects of this line of reasoning warrant reiterating. Firstly, the judgement expressly distinguishes between the prospective sexual offence and prospective assault. This is consequential in the context of the subsequent overturning of *Clarence* in *Dica*, as will be discussed below. It also enables an understanding of consent grounded in 19th century understanding of sex and marriage, including the marital rape exception mentioned above. Secondly, in

³⁴ Rubinfeld (n 28) 1397; Bethany Simpson, ‘Why Has the Concept of Consent Proven So Difficult to Clarify?’ (2016) 80 *The Journal of Criminal Law* 97, 106.

³⁵ *R v Flattery (John)* [1877] 2 QBD 410.

³⁶ Cooper and Reed (n 31) 469; Rubinfeld (n 28) 1372.

³⁷ *R v Flattery (John)* (n 35) 411–412.

³⁸ *R v Clarence* (n 9) 29 (Wills, J.).

³⁹ *R v Clarence* (n 9) 44–45 (Stephen J).

respect of the prospective assault, the analysis of Stephen J is centred on the nature of the deception *not* the transmission itself. Whilst this is reflective of the understanding of assaults commonplace at the time, this also has an increased relevance in contemporary debate on “sexual fraud”, discussed later in this chapter.

As such, *Clarence* served to set the terms of debate over deception in the context of sexual relationships over the entirety of the 20th century, alongside provisions on the procurement of consent by false pretences, found in the Criminal Law Amendment Act 1885.⁴⁰ False procurement provisions were reiterated, without significant amendment, by the Sexual Offences Act 1956.⁴¹ Subsequent proposed reforms continued to incorporate procurement provisions, although Laird suggests that this reflected a perception that ‘repeal of the offence would leave a lacuna in the law’ rather than regular use of such provisions.⁴² However, false procurement was not carried into the Sexual Offences Act 2003,⁴³ and it has been suggested that the provisions found in s. 76, relating to conclusive presumptions about sexual consent,⁴⁴ do not go far enough in capturing behaviour which would have been criminalised by the repealed provisions of the 1956 Act.⁴⁵ However, it should also be acknowledged that procurement provisions specifically related to the procurement of a *woman’s* consent by false pretences. No comparable provisions existed for the procurement of a man’s consent by false pretences. It has been suggested that the decision of the Court

⁴⁰ Criminal Law Amendment Act 1885, s. 3.

⁴¹ Sexual Offences Act 1956, s. 3.

⁴² Laird (n 17) 496–497.

⁴³ Rebecca Williams, ‘Deception, Mistake and Vitiating of the Victim’s Consent’ (2007) 124 Law Quarterly Review 132, 135; Laird (n 17) 497–500.

⁴⁴ Sexual Offences Act 2003, s. 76.

⁴⁵ Simpson (n 34) 110.

in *Clarence* can be said to be the result of misogyny on the part of the majority of the bench in that case.⁴⁶ In a similar respect, the gender limitations in procurement provisions, which only applied to female complainants,⁴⁷ it might also be suggested, were a result of the social and cultural biases of the period in which they were enacted and not fit for purpose in the modern age.

2.1.2 HIV/AIDS, Proposed Reforms and Case Law in the 1990s and Early 2000s

The application of *Clarence* can be seen across the 20th century and into the 21st, with it being suggested that it was not until *Dica* that these issues would finally be resolved.⁴⁸ In *Linekar*, in 1995, the Court of Appeal continued to draw on *Clarence* to distinguish between different categories of fraud.⁴⁹ As McCartney and Wortley highlight,⁵⁰ these principles were refined in *Richardson* – which developed the concept of fraud as to the ‘nature or quality of the act’.⁵¹ Stannard also suggests that this widening understanding of what constituted the quality of a sexual act can be seen in cases such as *Richardson* and *Tabassum*, which were decided in the years prior to the Sexual Offences Act 2003.⁵² Nevertheless, in the latter instance the Court of Appeal continued to endorse the principle that:

⁴⁶ Weait, *Intimacy and Responsibility: The Criminalisation of HIV Transmission* (n 9) 96.

⁴⁷ Notably, the provisions do appear equally applicable to male and female defendants, notwithstanding the lack of legal recognition of same-sex female relationships more generally at the time these provisions were enacted.

⁴⁸ See the Editor’s postscript in Gleeson (n 22) 229.

⁴⁹ *R v Linekar (Gareth)* [1995] QB 250.

⁵⁰ See Carole McCartney and Natalie Wortley, ‘Under the Covers: Covert Policing and Intimate Relationships’ (2018) 2 Criminal Law Review 137, specifically, footnote 40.

⁵¹ *R v Richardson (Diane)* [1999] QB 444, 449.

⁵² John E Stannard, ‘The Emotional Dynamics of Consent’ (2015) 79 The Journal of Criminal Law 422, 427.

The additional unexpected consequences, of infection in the one case and non payment in the other, were irrelevant to and did not detract from the woman's consent to sexual intercourse.⁵³

This is not to suggest, however, that the emergence of the HIV/AIDS epidemic had not prompted academic commentary on the potential reform of *Clarence* principles. In 1991, Smith commented on the '[c]onsiderable reluctance' of the courts to shift away from the narrow definition of the 'nature of the act' despite the concerns surrounding HIV/AIDS, stating:

In the case of an AIDS virus infected partner, however, it might be maintainable that an act of intercourse which carries a strong risk of consequential death is so vitally distinct from non-life-endangering intercourse as to render apparent consent to the whole act quite unreal.⁵⁴

As Ryan notes,⁵⁵ the Law Commission addressed the issue of HIV transmission criminalisation in the 1993 *Legislating the Criminal Code: Offences Against the Person and General Principles* consultation report.⁵⁶ The Commission noted 'the recent public concern over the possibility of deliberate or reckless infection of others with life-threatening conditions, including the HIV virus.'⁵⁷ Furthermore, the Commission commented on the necessity of distinguishing between infections of this kind and less serious, potentially minor, infections rather than merely relying on prosecutorial discretion to prevent prosecutions in cases of the latter variety.⁵⁸

⁵³ *R v Tabassum* [2000] 5 WLUK 243 [37].

⁵⁴ Smith (n 10) 315.

⁵⁵ Samantha Ryan, 'Disclosure and HIV Transmission' (2015) 79 *The Journal of Criminal Law* 395, 395–396.

⁵⁶ The Law Commission, *Legislating the Criminal Code: Offences against the Person and General Principles* (Law Com No 218, 1993) paras 15.15-15.19.

⁵⁷ The Law Commission, *Legislating the Criminal Code: Offences against the Person and General Principles* (n 56) para 15.17.

⁵⁸ The Law Commission, *Legislating the Criminal Code: Offences against the Person and General Principles* (n 56) para 15.18.

However, in a consultation report published a year later, *Criminal Law: Consent and Offences Against the Person*, HIV is barely referenced. Where it is discussed, the report considers HIV through a narrow lens within its discussion of the House of Lords decision in *Brown*,⁵⁹ with the ‘threat of serious injury or infection’ being a justification of the Lords approach in that case.⁶⁰ Discussion of HIV as a general and pervasive threat in the context of same-sex relationships, notwithstanding the HIV-negative status of the defendants in *Brown*, is emblematic of the approach to same-sex sexuality seen in the judicial reasoning in that case.⁶¹ The perceived exceptional nature of the HIV threat as such seems to have been comparable in these instances to broader debates surrounding injury arising from consensual sexual activity.⁶² In the context of debates around sadomasochistic injury, Cowan argues that ‘there appears to be some underlying and unstated normative principle driving the differentiation of normal (permissible) [sexual behaviours] from abnormal (impermissible) sexual behaviours’.⁶³

Similarly, in the context of HIV transmission, the normative principle driving the distinction between “serious” and “minor” infections were often framed as achieving a ‘sensible balance’ whilst in fact ‘forestall[ing] any populist criticism that [the government] was being “soft” on crime.’⁶⁴ Assuming that this balancing act would, given the context in which it is discussed, distinguish HIV transmission and the transmission of certain other “serious” infections from cases involving

⁵⁹ *R v Brown* [1993] UKHL 19.

⁶⁰ The Law Commission, *Consent and Offences Against The Person* (Law Com Consultation Paper No 134 1994) 11, specifically, footnote 36 (emphasis added).

⁶¹ Carl F Stychin, *Law’s Desire: Sexuality and the Limits of Justice* (Routledge 1995) 137.

⁶² On the broader debates surrounding *Brown*, see Herring (n 1) 86–97.

⁶³ Sharon Cowan, ‘The Pain of Pleasure: Consent and the Criminalisation of Sado-Masochistic “Assaults”’ in James Chalmers, Fiona Leverick and Lindsay Farmer (eds), *Essays in Criminal Law in Honour of Sir Gerald Gordon* (Edinburgh University Press 2010) 132.

⁶⁴ Weait, *Intimacy and Responsibility: The Criminalisation of HIV Transmission* (n 9) 23.

“less serious” infections, it is arguably a similar normative exercise to that discussed by Cowan. It is also indicative of two broader questions surrounding fraudulent acts in the context of consent. First, how to distinguish between consent to different consequences of the same action and, second, if and how to distinguish between different severities of fraud within those categories. The challenge of whether and how to distinguish between different categorisation of fraud was particularly emphasised by Ormerod in his work addressing the 1994 consultation.⁶⁵ The Law Commission suggested that where determining whether fraud was sufficient to invalidate consent: ‘the test should be, and should be no more than, whether the fraud or misrepresentation induced the victim’s consent.’⁶⁶ Ormerod noted that this would have the effect of overturning the approach set out in *Clarence* but also identified that this would have consequence beyond the scope of Offences Against the Person Act 1861 by opening up potential rape charges.⁶⁷ However, the Law Commission’s proposal also makes no differentiation between different severities of fraud, so that were the representation of even a relatively tangential detail in some manner considered fraudulent, the Commission provision would have effect.

This issue would arise again the following year. In 1995, the Commission’s *Consent in The Criminal Law* Consultation returned to the issue of fraudulently obtained consent, expressing specific concern over HIV status cases. In a similar vein to Smith,⁶⁸ the Commission stated that:

It seems to us that this type of fraudulent misrepresentation is morally different from a fraudulent promise to pay for sexual services, and that it

⁶⁵ Ormerod (n 9).

⁶⁶ The Law Commission, *Consent and Offences Against The Person* (n 60) para 26.1.

⁶⁷ Ormerod (n 9) 936.

⁶⁸ Smith (n 10).

comes close to affecting the nature of the act itself in that it deals with matters that can have a physical consequence.⁶⁹

Here, the Commission differentiated *Linekar*⁷⁰ type cases from those comparable to *Clarence*,⁷¹ whilst at the same time introducing a moralistic argument focused on the severity of the deception in these two kinds of case. The first issue with this proposition is whether it is necessary to introduce moral or ethical concepts into the distinction when the Commission then draws upon the legal concept of the “nature of the act itself”. The second issue is that by suggesting that *Clarence* type deceptions “come close” to affecting the nature of the act, the Commission introduced a degree of uncertainty. It is unclear what ingredient is missing (or rather present) which would differentiate *Clarence* type deceptions from deceptions as to the nature of the act.

On the first issue, it should be acknowledged that the moral and ethical scrutiny of defendants, distinct from arguments about criminal culpability, have been a persistent theme among the legal and academic literature discussed so far. In *Clarence*, Wills J suggests that the earlier decision in *Bennett* was ‘a case in which [the Judge] strained the law for the purpose of punishing a great wrong’.⁷² The Law Commission’s approach in 1995 might be viewed as an extension of this moralistic mentality and desire to enforce certain ethical standards through legal distinctions. This does not address the second issue, however, unless it is accepted that the moral difference has an influence upon the nature of the act – which seems distinct from the emphasis on physical consequences in the

⁶⁹ The Law Commission, *Consent in The Criminal Law* (Law Com Consultation Paper No 139 1995) para 6.19.

⁷⁰ *R v Linekar (Gareth)* (n 49).

⁷¹ *R v Clarence* (n 9).

⁷² *R v Clarence* (n 9) 35–36 (Wills, J).

Commission's argument. If instead, it is the physical consequences of the misrepresentation which are the focus of the Commission's argument, this too seems to be somewhat removed from the misrepresentation itself. In *Clarence* this point was itself considered by Stephen J, who queried whether an assault would be committed prior to it becoming apparent whether transmission had occurred or not.⁷³ Here, the emphasis on the misrepresentation as akin to an element of the offence, rather than as an element of a defence – as will be seen in the developments in *Dica* and *Konzani* in the next section – appears to undermine the approach to assaults the Commission proposed in 1995.

These issues would come to be of practical significance across the final years of the 1990s and into the new decade. The timing of these developments is not without significance. Advancements in the treatment of HIV in the 1990s had a significant impact upon the prognosis of many of those diagnosed as HIV+ who were able to access treatment, and consequently upon practices of HIV prevention.⁷⁴ In 2001, *HMA v Kelly* established that HIV transmission was an offence under Scots criminal law.⁷⁵ Chalmers notes how *Kelly* prompted further questions about the state of English criminal law and placed a renewed emphasis on the various proposals made by the Law Commission.⁷⁶ Ormerod, noting the developments of *Kelly* and similar case law in other jurisdictions, returned to the question of whether criminalisation was a necessary or appropriate response to

⁷³ *R v Clarence* (n 9) 45 (Stephen J).

⁷⁴ See Susan Kippax and Kane Race, 'Sustaining Safe Practice: Twenty Years On' (2003) 57 *Social Science and Medicine* 1. These issues are discussed in further detail below at 2.3.

⁷⁵ *HMA v Kelly* [2001] Unreported; for a detailed discussion of the case, see Victor Tadros, 'Recklessness, Consent and the Transmission of HIV' (2001) 5 *Edinburgh Law Review* 371.

⁷⁶ James Chalmers, 'The Criminalisation of HIV Transmission' (2002) 28 *Journal of Medical Ethics* 160, 160.

HIV transmission.⁷⁷ These two questions had been consistent themes within the consultations discussed above, as well as in more general debate, and Ormerod commented that there were 'still no effective solutions' to the issue at that time.⁷⁸ Nevertheless, two cases in the early 2000s would produce a solution within English Criminal Law, with the historic background set out above framing the tension between disease transmission as an assault versus non-disclosure as a sexual offence,⁷⁹ which these cases would (in part) address.

2.2 *Dica* and *Konzani*: Criminalising Reckless Transmission

2.2.1 *R v Mohammed Dica* [2004] EWCA Crim 1103

The precedent established in *Clarence* would prove key to understanding the transformation brought about in *Dica* in 2004. Mohammed Dica was diagnosed with HIV in 1995 and began to receive treatment for the condition at that time. Dica would then go on to have unprotected sexual intercourse with two women between 1997 and 2001, who would both go on to be diagnosed as HIV+.⁸⁰ Dica was charged with two counts of causing grievous bodily harm, contrary to s.20 of the Offences Against the Person Act 1861.⁸¹ In the Court of Appeal's analysis of the initial trial, it is explained that

Judge Philpot [the trial judge] made two critical but distinct rulings. First, he concluded that notwithstanding the well-known decision by the Crown Cases Reserved in *R v Clarence* (1889) 22 QB 23, it was open to the jury to convict the appellant of the offences alleged in the indictment, on the basis that its standing as "an important precedent has been thoroughly undermined, and ... provides no guidance to a (first) instance judge". His second conclusion, which in a sense was more far-reaching, was that

⁷⁷ David Ormerod, 'Criminalizing HIV Transmission-Still No Effective Solutions' (2001) 1 Common Law World Review 135, 141–142.

⁷⁸ Ormerod (n 77).

⁷⁹ Chalmers (n 76) 160.

⁸⁰ *R v Dica* [2004] EWCA Crim 1103 [4]-[8] (Judge LJ).

⁸¹ Offences Against the Person Act 1861, s.20.

whether or not the complainants knew of the appellant's condition, their consent, if any, was irrelevant and provided no defence.⁸²

In concurring with the first ruling of Philpot J, and emphasising that *Clarence* was no longer authoritative on the issue of disease transmission, the Court of Appeal (CoA) explicitly identified changing attitudes towards sex and sexuality. In particular, the CoA acknowledged that the marital rape exception critical to the decision in *Clarence* had 'finally been identified as a fiction in *R v R*'.⁸³ Also demonstrated in the CoA's judgment is the changing construction of "inflict" in modern legal analysis.⁸⁴ This was exemplified by the House of Lords in *Ireland and Burstow*, where the decision of *Clarence* was described as 'troublesome' and Lord Steyn stated that 'criminal law has moved on' since the time *Clarence* was decided.⁸⁵

Nevertheless, the decision of the Judge at first instance was, in part, overturned, specifically in respect of the second aspect of the ruling. In finding that consent was relevant to the s.20 charge, the CoA distinguished *Dica* from the well-known precedent, established in *Brown*, that consent cannot operate as a defence to serious harms. As Davies notes,⁸⁶ this distinction was achieved by differentiating between consent to serious harm and consent *to the risk of injury*. As with Cowan's assessment of the decision in *Brown*, discussed above,⁸⁷ Lord Justice Judge's analysis of the distinction between '*indulging* in serious violence for the purposes of sexual gratification' and running the risk of disease transmission 'as

⁸² *R v Dica* (n 80) [13] (Judge LJ).

⁸³ *R v Dica* (n 80) [19] (Judge LJ).

⁸⁴ *R v Dica* (n 80) [29] (Judge LJ).

⁸⁵ *R v Ireland; R v Burstow* [1988] AC 147, 160 (Lord Steyn).

⁸⁶ Mitchell Davies, 'R v Dica: Lessons in Practising Unsafe Sex' (2004) 68 *The Journal of Criminal Law* 498, 500.

⁸⁷ Cowan (n 63).

well as all the other risks inherent in and possible consequences of sexual intercourse',⁸⁸ appears to develop from a conceptualisation of "normal" (i.e. good and permissible) sex distinct from *indulgent* (i.e. bad and prohibited) sex.⁸⁹

This would also support the argument put forward by Weait that the approach taken in *Dica* incorporated presumed moral values.⁹⁰ Highlighting the 'measured approval' of Judge LJ in respect of the analysis presented by Spencer,⁹¹ Weait demonstrates how the judgment in *Dica* puts forward an understanding that the law on transmission 'is, and should be, somehow dependent on a moral or ethical judgement about the kind and quality of relationship' that the defendant and complainant have.⁹² It is also important to note that judicial commentary on the impact of *Dica* has similarly noted that public opinion, or – it might be suggested – presumed public opinion, is influential in the distinctions between permissible and indulgent sexuality. In the *R v Barnes*, in 2004, Lord Woolf CJ emphasises the manner in which 'changing public attitudes can affect the activities which are classified as unlawful, as the judgment in *Dica* demonstrates.'⁹³

As well as its general influence upon the CoA's approach in *Dica*, the specific influence of the moral and ethical prioritisation of certain kinds of relationship can be observed in the construction of consent to the risk of transmission that the

⁸⁸ *R v Dica* (n 80) [47] (Judge LJ, emphasis added).

⁸⁹ On the hierarchy and charmed circle of sexual practices, see Gayle S Rubin, 'Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality', *From Gender to Sexuality* (1984); and, Chris Ashford, '(Homo)Normative Legal Discourse' [2011] *Durham Law Review* 77, in particular, at 84. These points are returned to below.

⁹⁰ Matthew Weait, 'Harm, Consent and the Limits of Privacy' (2005) 13 *Feminist Legal Studies* 97.

⁹¹ JR Spencer, 'Liability for Reckless Infection Pt 1' (2004) 154 *New Law J* 384; JR Spencer, 'Liability for Reckless Infection Pt 2' (2004) 154 *New Law J* 448.

⁹² Weait, 'Harm, Consent and the Limits of Privacy' (n 90) 115; see *R v Dica* (n 80) [15] and [55].

⁹³ *R v Barnes (Mark)* [2004] EWCA Crim 3246 [11] (Lord Woolf CJ).

Court puts forward. In order to justify the ability of *some* couples to consent to the risk of transmission, the Court suggests two examples of where consent to the risk of transmission is permissible. The first of these examples involves a couple who are Roman Catholic and ‘conscientiously’ object to the use of artificial contraception. The second involves a couple who are attempting to conceive and who therefore desist from condom use,⁹⁴ which whilst not strictly the only option was nevertheless a reality of HIV/AIDS treatment at that time.⁹⁵

It is significant that in both of these examples the parties are in an opposite-sex relationship – in the case of the explicitly conscientious Roman Catholic couple (presumably) married – and that the willingness to run the risk of transmission stems from some external justification, religion or conception, rather than the internal dynamics of the relationship itself. This is not to suggest that the internal dynamics of a particular relationship are not significant to the CoA’s analysis of consent to transmission risk altogether. As Rogers highlights,⁹⁶ there is an acknowledgement that consent may occur because of a ‘loving ... and trusting relationship’.⁹⁷ However, this kind of relationship is distinguished from other categories of relationship because of its duration and, because of an emphasis

⁹⁴ *R v Dica* (n 80) [49] (Lord Judge).

⁹⁵ It should be noted that even before the development of newer treatment options, which make conception possible without transmission risk, there were techniques to reduce, although not eliminate, the risk of transmission whilst enabling conception. See, for instance, Chelsea and Westminster Hospital NHS Foundation Trust, ‘Sperm Washing’ <<https://www.chelwest.nhs.uk/private-care/fertility-treatment/treatment-options/treatment-options-1/sperm-washing>> accessed 3 July 2020.

⁹⁶ Jonathan Rogers, ‘Criminal Liability for the Transmission of HIV’ (2005) 64 *The Cambridge Law Journal* 20, 20.

⁹⁷ *R v Dica* (n 80) [47] (Judge LJ).

on the secondary and infrequent nature of transmission risk,⁹⁸ arguably by its de-sexed nature.⁹⁹

At the subsequent retrial, Dica was convicted on the original charges, notwithstanding the availability of a consent defence which the CoA's judgment afforded him.¹⁰⁰ *Dica* represented a significant step in the development of disease criminalisation in England and Wales. As Chalmers puts it:

Before *Dica*, the question was this: "is there a convincing case for criminalising the reckless transmission of disease?" Now, the question is, "is there a convincing case for creating an exception to the general criminalisation of recklessly harming another person"?

Chalmers adds that:

There is nothing illogical about answering both questions in the negative.¹⁰¹

It would also be incorrect to suggest that *Dica* resulted in a complete and consistent framework of transmission criminalisation. *Dica* left several issues unaddressed or unresolved within its analysis. On the one hand, Dica's knowledge about his own HIV status meant that the issues apparent with a defendant who is undiagnosed and uncertain about his HIV status received little attention.¹⁰² On the other hand, the complainants' existing knowledge about HIV transmission risk associated with unprotected sexual intercourse was also insufficiently addressed in the judgment in *Dica*, as Weait and Ryan both

⁹⁸ Judge LJ stating that these relationships may 'from time to time also carry risks'. See *R v Dica* (n 80) [47] (Judge LJ).

⁹⁹ For further discussion of intimate culture and heteronormativity, which arguably is demonstrated in this section of Dica's judgment, see Lauren Berlant and Michael Warner, 'Sex in Public' (1998) 24 *Critical Inquiry* 547, in particular, at 650-562.

¹⁰⁰ Munro (n 25) 115.

¹⁰¹ Chalmers (n 9) 139.

¹⁰² The challenge of developing a framework of liability when different defendants will necessarily have different levels of awareness of their HIV status was noted in discussion contemporary with *Dica*. See Warburton (n 11).

observe.¹⁰³ Munro argues that the CoA in *Dica* took ‘refuge in the specific grounds of appeal’ rather than addressing the broader issues which *Dica* embodied and that, as a result, ‘the wider impact of the resultant criminalisation of Mohammed Dica’s conduct was left largely unaddressed.’¹⁰⁴ However, several of these issues would be, almost immediately,¹⁰⁵ taken up in the case of *R v Konzani* in 2005.

2.2.2. *R v Feston Konzani* [2005] EWCA Crim 706

Feston Konzani was diagnosed as HIV-positive in November 2000 and between 2001 and 2003 had sex with three women who would go on to be diagnosed as HIV+. In Konzani’s initial trial, at the Crown Court in Middlesbrough in 2004, Fox J directed the jury that in order to convict they would need to be certain that each complainant ‘did not willingly consent to the risk of suffering that infection’.¹⁰⁶ Konzani was convicted on three counts of s.20 GBH and, at the direction of Fox J, acquitted on a fourth count relating to a separate complainant.¹⁰⁷

Several of the unresolved issues of *Dica* were central to Konzani’s appeal. In particular, Konzani claimed that a consent defence should have been open to him on the basis of an honest, although mistaken and unreasonable, belief that the complainants were in fact consenting to the risk of transmission.¹⁰⁸ Awareness of

¹⁰³ Matthew Weait, ‘Knowledge, Autonomy and Consent: R v Konzani’ [2005] Criminal Law Review 763, 764; Samantha Ryan, ‘Risk-Taking, Recklessness and HIV Transmission: Accommodating the Reality of Sexual Transmission of HIV within a Justifiable Approach to Criminal Liability’ (2007) 28 Liverpool Law Review 215, 220.

¹⁰⁴ Munro (n 25) 119.

¹⁰⁵ In fact, as Weait notes, the first instance trial of Konzani began on the day the CoA’s judgment in *Dica* was handed down. See Weait, *Intimacy and Responsibility: The Criminalisation of HIV Transmission* (n 9) 70.

¹⁰⁶ Fox J is referenced by Judge LJ in the CoA judgment. See *R v Konzani (Feston)* [2005] EWCA Crim 706 [34] (Judge LJ).

¹⁰⁷ *R. v Konzani (Feston)* (n 106) [1] (Judge LJ).

¹⁰⁸ *R. v Konzani (Feston)* (n 106) [36] (Judge LJ).

risk and the distinctions between general awareness of the *multiple risks* associated with unprotected sex and specific awareness of the *particular risk* accompanying unprotected sex with someone living with HIV played a central role in the judgment. Judge LJ concluded that:

There is a critical distinction between taking a risk of the various, potentially adverse and possibly problematic consequences of sexual intercourse, and giving an informed consent to the risk of infection with a fatal disease. For the complainant's consent to the risks of contracting the HIV virus to provide a defence, it is at least implicitly from the reasoning from R v Dica, and the observations of Lord Woolf CJ in R v Barnes confirm, that her consent must be an informed consent.¹⁰⁹

Weait has argued that this fails to take account of complainants' existing knowledge of HIV transmission and that, consequently, it comes close to equating non-disclosure alone with recklessness.¹¹⁰ Given that it remains a possibility that a defendant could be charged with a transmission offence without themselves being aware of their status,¹¹¹ it is also at least theoretically possible that a defendant may have less knowledge about HIV transmission risk than the complainant in a given situation. In his analysis of *Dica*, Spencer is critical of claims that complainants should be held – even partially – responsible for not inquiring about a prospective partner's HIV status, at least in the context of non-casual, non-commercial sex.¹¹² Although this is indicative of a broader debate concerning the criminalisation of transmission, it may also serve to highlight how proponents of criminalisation are less concerned with complainants' knowledge, but rather whether they come to it through the defendant.¹¹³

¹⁰⁹ *R. v Konzani (Feston)* (n 106) [41] (Judge LJ, emphasis in original).

¹¹⁰ Weait, 'Knowledge, Autonomy and Consent: R v Konzani' (n 103) 765–766.

¹¹¹ See Warburton (n 11); this point has been reiterated more recently by The Law Commission. See The Law Commission, *Reform of Offences Against The Person* (Law Com No 361 2015) at para 6.17. These points are returned to below.

¹¹² Spencer, 'Liability for Reckless Infection Pt 2' (n 91).

¹¹³ Ryan, "Active Deception" v Non-Disclosure: HIV Transmission, Non-Fatal Offences and Criminal Responsibility' (n 13) 7.

In this context, it is also important to note the CoA's emphasis on the severity of HIV and its status as a 'fatal disease'.¹¹⁴ Again, many of the arguments put forward in favour of criminalisation have sought to identify a category, or categories, of disease which are of sufficient severity that complainants *ordinary* knowledge of risks associated with a "normal" lifestyle" become insufficient for consent to be informed through this knowledge.¹¹⁵ In *Konzani*, the CoA expressed the view that '[i]n the public interest, so far as possible, the spread of *catastrophic* illness must be avoided or prevented.'¹¹⁶ In an oft referenced section, the court went on to explain:

If an individual who knows that he is suffering from the HIV virus conceals this stark fact from his sexual partner, the principle of her personal autonomy is not enhanced if he is exculpated when he recklessly transmits the HIV virus to her through consensual sexual intercourse. On any view, the concealment of this fact from her almost inevitably means that she is deceived. Her consent is not properly informed, and she cannot give an informed consent to something of which she is ignorant. Equally, her personal autonomy is not normally protected by allowing a defendant who knows that he is suffering from the HIV virus which he deliberately conceals, to assert an honest belief in his partner's informed consent to the risk of transmission of the HIV virus. Silence in these circumstances is incongruous with honesty, or with a genuine belief that there is an informed consent.¹¹⁷

In the next section, I go on to address the changing nature of HIV infections in the UK and the manner in which new methods of prevention and treatment may alter the distribution of responsibilities relating to HIV prevention. However, at this stage it is important to note how the perceived severity of HIV infection is drawn upon in the CoA's judgment and used to develop what both Weait and Ryan have

¹¹⁴ *R. v Konzani (Feston)* (n 106) [41] (Judge LJ).

¹¹⁵ Spencer, 'Liability for Reckless Infection Pt 1' (n 91).

¹¹⁶ *R. v Konzani (Feston)* (n 106) [42] (Judge LJ, emphasis added).

¹¹⁷ *R. v Konzani (Feston)* (n 106) [42] (Judge LJ, emphasis added).

discussed in terms of an “effective” duty to disclose’ known HIV status.¹¹⁸ This duty is “effective” because the CoA’s judgment does retain the possibility that a complainant may be sufficiently informed about a defendant’s HIV status, in the absence of direct disclosure, for consent to be informed consent. Judge LJ stating that ‘there may be circumstances in which it would be open to the jury to infer that, notwithstanding that the defendant was reckless and concealed his condition from the complainant, she may nevertheless have given an informed consent’ because of an awareness gained from other sources – the example given being where the complainant and defendant meet whilst the latter is being treated for his infection.¹¹⁹

However, when read in conjunction with the CoA’s insistence that ‘[s]ilence in these circumstances is incongruous with honesty, or with a genuine belief’ in informed consent,¹²⁰ the limited effect of this exception becomes readily apparent. As Weait establishes,¹²¹ this exception provides only very limited circumstances where defendants may be able to claim a reasonable belief in consent. It might also be pointed out that, irrespective of this provision, the only way that people living with HIV can be certain that they are not committing an offence is to disclose their HIV status.¹²² Although, as will be discussed below, preventative techniques – including treatment as a form of prevention – can reduce or eliminate transmission risk, the (often theoretical) risk that these techniques might fail, along with the possibility that recklessness might be found by a jury despite some

¹¹⁸ Ryan, “Active Deception” v Non-Disclosure: HIV Transmission, Non-Fatal Offences and Criminal Responsibility’ (n 13) in particular, note 24; Weait, ‘Knowledge, Autonomy and Consent: R v Konzani’ (n 103) 767.

¹¹⁹ *R. v Konzani (Feston)* (n 106) [44] (Judge LJ).

¹²⁰ *R. v Konzani (Feston)* (n 106) [42] (Judge LJ, emphasis added).

¹²¹ Weait, ‘Knowledge, Autonomy and Consent: R v Konzani’ (n 103) 767–768.

¹²² Herring (n 1) 81.

precautions being taken,¹²³ results in an “effective” disclosure obligation if the risk of prosecution is to be entirely avoided.

The relationship between Konzani’s knowledge of his HIV status, the expected (limited) knowledge of the complainants in the case, and consequentially the positioning of Konzani as a ‘blameworthy defendant’,¹²⁴ work together to demonstrate the importance of contextual expectations in HIV transmission cases. In *Dica*,¹²⁵ in order to distinguish that case from *Brown*,¹²⁶ it was necessary for the CoA to differentiate between running a risk and that risk coming to fruition. In *Konzani*, the CoA then had to effectively determine in what situations a defendant’s *belief* in consent would be honest. It achieved this by creating a standard of reasonable behaviour – non-silence, or disclosure – and contrasting this with Konzani’s culpable behaviour – non-disclosure. This culpable behaviour is framed as an active – deliberate concealment – rather than a passive action or mistake.¹²⁷ Framing what is arguably an omission as an act in this way might be described as the CoA identifying expectations associated with the context of sexual activity and elevating these to the standard of *reasonable and expected* behaviour, or what Ryan has termed a ‘cold and unrealistic approach to criminal

¹²³ As discussed below, prosecutorial discretion in such cases means that CPS guidance on this point plays a critical role. See Crown Prosecution Service, ‘Legal Guidance for Prosecutors and Guidance: Intentional or Reckless Sexual Transmission of Infection’ (*Prosecution Policy and Guidance*)

<http://www.cps.gov.uk/legal/h_to_k/intentional_or_reckless_sexual_transmission_of_infection_guidance/> accessed 4 April 2020; David Hughes, ‘Condom Use , Viral Load and the Type of Sexual Activity as Defences to the Sexual Transmission of HIV’ (2013) 77 *The Journal of Criminal Law* 136.

¹²⁴ Weait, *Intimacy and Responsibility: The Criminalisation of HIV Transmission* (n 9) 43–45.

¹²⁵ *R v Dica* (n 80).

¹²⁶ *R v Brown* (n 59).

¹²⁷ On active/passive distinctions, see Williams (n 43) 145–146; Ryan discusses how liability in *Konzani* stemmed from the perceived equivivalence of non-disclosure and deception, see Ryan, “Active Deception” v Non-Disclosure: HIV Transmission, Non-Fatal Offences and Criminal Responsibility’ (n 13) in particular, at 7-8.

liability ... in which a common sense pragmatic view of what constitutes “proper” conduct in sexual relations, that is largely at odds with the reality of sexual behaviour’ is enforced by the courts.¹²⁸

In this section, I have introduced the two major cases through which the criminal law on HIV transmission in England and Wales has developed. These two cases reframed debate on disease transmission and subsequent debate has often been framed by the outcomes of these two cases. However, in the 16-plus years since the offences in *Dica* and *Konzani* were committed there has been a range of medical and pharmaceutical developments which the current law on HIV transmission must contend with. Therefore, before turning to literature on the theoretical and practical justifications of HIV transmission criminalisation, I will first summarise the changing nature of HIV testing, treatment and prevention.

2.3 The Evolving Nature of HIV Treatment and Prevention

Dica and *Konzani* both, in their own ways, demonstrate judicial concern over the severity of HIV, when contrasted with other, less serious, infections which are described as ‘various, potentially adverse and possibly problematic’.¹²⁹ As with Weait’s analysis of the various proposals pre-*Dica*, the focus appears to have been to achieve some “sensible balance”,¹³⁰ which neither prevents prosecutions for “serious” cases but also does not entail mass prosecutions for “trivial” infections. This introduces the issue of categorising different transmission cases

¹²⁸ Ryan, ‘Risk-Taking, Recklessness and HIV Transmission: Accommodating the Reality of Sexual Transmission of HIV within a Justifiable Approach to Criminal Liability’ (n 103) 222–223.

¹²⁹ *R. v Konzani (Feston)* (n 106) [41] (Judge LJ).

¹³⁰ Weait, *Intimacy and Responsibility: The Criminalisation of HIV Transmission* (n 9) 23.

within the law and the general lack of stratification seen in transmission cases thus far. Furthermore, it raises the prospect that the categorisation of HIV among the *most serious* infections may become, or has already become, outdated. Whether this is the case and how the law should respond to advancements in treatment and prevention are both pressing social and socio-legal issues.

During the 1990s, the development of Highly-Active Antiretroviral Therapy, or “HAART”, meant that HIV was no longer, necessarily, a life-limiting condition, given access to treatment.¹³¹ Kippax and Race explain that ‘HAART changed the face of AIDS’, including the face of HIV prevention and of safer sex.¹³² Van Doorn suggests that prior to HAART, a HIV diagnosis ‘could do little more than expose infected individuals to the risk of stigma’ but that after HAART’s introduction diagnosis came to be constructed as integral to the health of the individual as well as to the broader public health.¹³³ Whilst global disparities in access to testing and treatment mean that HIV/AIDS continues to be a global health concern,¹³⁴ HAART has demonstrably had a profound effect on the lives of people *living* with HIV and has been discussed in terms of producing a “post-AIDS” reality, although it has been suggested such claims are misguided.¹³⁵

Weait notes that as HAART was introduced, ‘a renewed commitment on the part of the international community to ensuring that [People Living with AIDS] should

¹³¹ Michael H Merson and others, ‘The History and Challenge of HIV Prevention’ (2008) 372 *The Lancet* 475, 484.

¹³² Kippax and Race (n 74) 6.

¹³³ Niels van Doorn, ‘Treatment Is Prevention: HIV, Emergency and the Biopolitics of Viral Containment’ (2013) 27 *Cultural Studies* 901, 907.

¹³⁴ Joseph J Amon and Nina Sun, ‘HIV, Human Rights and the Last Mile’ (2019) 22 *Journal of the International AIDS Society*.

¹³⁵ Liz Walker, ‘Problematising the Discourse of “Post-AIDS”’ [2017] *Journal of Medical Humanities*.

not, by virtue of their HIV status, suffer in their enjoyment of basic human rights' took place.¹³⁶ However HAART, along with what has been described as "condom fatigue",¹³⁷ may also have added to a renewed emphasis on disclosure as a means of HIV prevention.¹³⁸ This renewed emphasis on disclosure is significant, not only in the context of the ongoing distribution of responsibility for HIV-prevention in non-legal settings,¹³⁹ but also in setting the context for legal decisions. Debate over the efficacy of condoms as a means of HIV prevention and the adequacy of condoms and HAART in the absence of disclosure is a longstanding issue of legal contention.¹⁴⁰ Considering these issues in a global context, as well as with specific reference to *Dica*, Klein notes that there is no objective basis for determining the point at which risk is unjustifiable and that 'social values can be expected to play an important role and may lead to convictions based on lower-risk or no-risk activities.'¹⁴¹

More recent developments may further compound these issues. If HAART is to be described as the first turning point in the history of HIV treatment, then *Treatment as Prevention*, or "TasP", might be described as the second. The revelation that, whilst on effective treatment, transmission risk through sexual intercourse can be eliminated for people living with HIV has been framed as 'a

¹³⁶ Weait, *Intimacy and Responsibility: The Criminalisation of HIV Transmission* (n 9) 6.

¹³⁷ Jeffrey Escoffier, 'Sex, Safety, and the Trauma of AIDS' (2011) 39 *WSQ: Women's Studies Quarterly* 129, 133.

¹³⁸ Simoni and Pantalone note that disclosure orientated public health campaign from the late-1980s onwards drew on the idea that disclosure was itself a HIV prevention technique. See Jane M Simoni and David W Pantalone, 'Secrets and Safety in the Age of AIDS: Does HIV Disclosure Lead to Safer Sex?' (2004) 12 *Topics in HIV Medicine* 109.

¹³⁹ Scott Burris and Matthew Weait, 'Criminalisation and the Moral Responsibility for Sexual Transmission of HIV', *Third Meeting of the Technical Advisory Group on the Global Commission on HIV and the Law* (2013).

¹⁴⁰ Hughes, 'Condom Use, Viral Load and the Type of Sexual Activity as Defences to the Sexual Transmission of HIV' (n 123).

¹⁴¹ Alana Klein, 'Criminal Law, Public Health, and Governance of HIV Exposure and Transmission' (2009) 13 *The International Journal of Human Rights* 251, 258.

seismic shift in the discursive framing of the HIV body.¹⁴² TasP and its associated slogan “Undetectable=Untransmittable” (“U=U”),¹⁴³ have not only had a profound effect on public health narratives on HIV, these developments have also impacted the personal narratives and identities of those living with the virus. Grace and colleagues conclude that “undetectable”, as well as acting as a clinical marker, serves as a prevention orientated identity for some men who have sex with men and that “achieving” an undetectable viral load acts as ‘a signifier of a return to normalcy post-diagnosis’.¹⁴⁴ For some, this effect has been so significant that an undetectable viral load has taken on an equivalence to being HIV-negative.¹⁴⁵

Further variations in identity and taxonomy in relation to HIV have emerged in the last decade. Among the many changes which have developed, some of the most significant have stemmed from the propagation of Pre-Exposure Prophylaxis, or “PrEP”. PrEP is a pharmaceutical prevention technique which can significantly reduce (although not eliminate) the risk of acquiring HIV when taken consistently, offering a highly effective alternative to condom use.¹⁴⁶ PrEP has also served as a catalyst for renewed social and political debate surrounding HIV prevention,

¹⁴² Asha Persson, ‘Non/Infectious Corporealities: Tensions in the Biomedical Era of “HIV Normalisation”’ (2013) 35 *Sociology of Health and Illness* 1065, 1067.

¹⁴³ Undetectable referring to the undetectable viral load, or volume of HIV in a individual’s blood, untransmittable reflecting the absence of transmission risk for these individuals. See British HIV Association, ‘BHIVA Endorses “Undetectable Equals Untransmittable” (U=U) Consensus Statement’ (12 July 2017).

¹⁴⁴ Daniel Grace and others, ‘Becoming “Undetectable”: Longitudinal Narratives of Gay Men’s Sex Lives After a Recent HIV Diagnosis’ (2015) 27 *AIDS Education and Prevention* 333, 346.

¹⁴⁵ Mario Brondani, Leeann Donnelly and Jonathan Postnikoff, “‘I’m Not HIV Positive, I’m Undetectable’: Community Forum on Issues of Stigma.’ (2016) 1 *Stigma and Health* 244.

¹⁴⁶ Ingrid Young, Paul Flowers and Lisa Mcdaid, ‘Can a Pill Prevent HIV? Negotiating the Biomedicalisation of HIV Prevention’ (2016) 38 *Sociology of Health and Illness* 411; Matthew Thomann, “‘On December 1, 2015, Sex Changes. Forever’: Pre-Exposure Prophylaxis and the Pharmaceuticalisation of the Neoliberal Sexual Subject’ (2018) 13 *Global Public Health* 997; Iain Williamson and others, “‘There’s This Glorious Pill’: Gay and Bisexual Men in the English Midlands Navigate Risk Responsibility and Pre-Exposure Prophylaxis’ (2019) 29 *Critical Public Health* 560.

much of it centred around the judicial review of the decision by NHS England that PrEP provision did not fall under its remit.¹⁴⁷ As Gonzales notes,¹⁴⁸ PrEP has also resulted in a range of new HIV-related identities for those who might traditionally have identified only as HIV-negative. Indeed, many of these identities can be seen on dating applications, with identities such as ‘Negative, on PrEP’ appearing alongside “Undetectable” in contrast to the traditional positive-negative binary.¹⁴⁹

Hughes and Reed argue that biopharmaceutical HIV prevention techniques, particularly TasP, have yet to receive significant attention in English jurisprudence.¹⁵⁰ As with earlier debates surrounding condom use, it remains uncertain whether the ineffective use of TasP would demonstrate recklessness on the part of a defendant or not.¹⁵¹ Furthermore, whilst there is, demonstrably, no offence where (unintended) transmission does not occur because of TasP, the worrying possibility of police investigations and prosecutions of those relying on TasP as a means of HIV prevention is not wholly farfetched, Yusef Azad raising such concerns as recently as 2019.¹⁵² Haire and Kaldor suggest that TasP, in

¹⁴⁷ Alexander Maine, ‘Bareback Sex, PrEP, National AIDS Trust v NHS England and the Reality of Gay Sex’ [2019] *Sexualities*; Sharif Mowlabocus, “‘What a Skewed Sense of Values’: Discussing PreP in the British Press’ [2019] *Sexualities*.

¹⁴⁸ Octavio R González, ‘HIV Pre-Exposure Prophylaxis (PrEP), “The Truvada Whore”, and The New Gay Sexual Revolution’ in Ricky Varghese (ed), *Raw* (Zed 2019) 49–50.

¹⁴⁹ González (n 148) 49; See, for instance, ‘Know Your Status: What Do the Different KYS Options Mean?’ (*Hornet*) <<https://hornet.com/about/know-your-status/>> accessed 15 August 2019.

¹⁵⁰ David Hughes and Alan Reed, ‘Criminalisation of HIV Transmission: Anglo-North-American Comparative Perspectives and Optimal Reforms to Failure of Proof Defences’ in Chris Ashford, Alan Reed and Nicola Wake (eds), *Legal Perspectives on State Power* (Cambridge Scholars Publishing 2016) 254–255.

¹⁵¹ Hughes, ‘The Criminal Transmission of HIV: Issues with Condom Use and Viral Load’ (n 11) 190.

¹⁵² See Azad in Emily Jay Nicholls and Marsha Rosengarten (eds), ‘Witness Seminar: The Criminalisation of HIV Transmission in the UK’, *Disentangling European HIV/AIDS Policies: Activism, Citizenship and Health (EUROPACH)* (2019) at p. 31.

particular, reshapes the boundaries of safer sex and should be ‘interpreted as a “reasonable precaution”’ and therefore indicative of non-culpable behaviour.¹⁵³

These recent developments in treatment and prevention of HIV, as such, have a significant impact upon general debates over the criminalisation of HIV transmission. As Mathen and Plaxton have observed in a Canadian context, in the age of treatment as prevention, the law is effectively called upon to determine the point at which transmission risk becomes too significant as to be non-dismissible by imposing criminal sanctions where levels of risk are ‘too much’.¹⁵⁴ The Canadian legal framework on transmission differs to England and Wales, in particular retaining the potential for convictions in instances of reckless exposure not resulting in transmission.¹⁵⁵ Nevertheless, the somewhat contractual manner in which the “significance” of risk is determined, which is noted by Mathen and Plaxton,¹⁵⁶ does, I would suggest, reflect a broader influence of marketplace ideals in the debate on transmission criminalisation and responsibility.

2.4 Trust and Managing HIV Transmission Risk: Arguments for Criminalisation

As noted above, there has been significant debate surrounding the theoretical justifications for criminalising of HIV transmission, which have persisted since *Dica* and *Konzani* established the legal basis for prosecutions via s.20 OAPA 1861. The theoretical justifications for these offences continue to be debated with

¹⁵³ Bridget Haire and John Kaldor, ‘HIV Transmission Law in the Age of Treatment-as-Prevention’ (2015) 41 *Journal of Medical Ethics* 982.

¹⁵⁴ Mathen and Plaxton (n 6) 476.

¹⁵⁵ *R v Cuerrier* (1998) 2 SCR 371 (Canada).

¹⁵⁶ Mathen and Plaxton (n 6) 478–479.

the medical advancements discussed in the previous section arguably resulting in a renewed uncertainty over the true justifications for punishment in transmission cases. Herring suggests that, for most people, the failure of a person living with HIV to disclose their status would be considered a grave (moral) wrong, where transmission occurs.¹⁵⁷ This may or may not be the case; however, this suggestion highlights that the act of non-disclosure and its relevance to consent have been core components of debate on HIV offences alongside the “wrong” of transmission itself.¹⁵⁸

Dica clearly established that reckless transmission would not constitute a sexual offence but did instead constitute GBH.¹⁵⁹ In *EB*, the Court of Appeal reiterated this point, maintaining that whilst active deception might undermine consent to sexual activity, mere non-disclosure did not.¹⁶⁰ As will be discussed below, the more recent case of *Rowe* did not follow this approach, utilising s.18 OAPA 1861 charges instead.¹⁶¹ It is significant, therefore, that many of the arguments in favour of criminalisation discussed in earlier literature placed an emphasis on the complainant’s consent to sex, generally, in situations where HIV status is misrepresented to them.¹⁶²

The Sexual Offences Act 2003 holds that in order for an individual to consent s/he must agree ‘by choice’ and have ‘the freedom and capacity to make that

¹⁵⁷ Herring (n 1) 75.

¹⁵⁸ Hughes and Reed (n 150) 254–255.

¹⁵⁹ *R v Dica* (n 80).

¹⁶⁰ *R v EB* [2006] EWCA Crim 2945.

¹⁶¹ *R v Rowe* [2018] EWCA Crim 2688.

¹⁶² James Slater, ‘HIV, Trust and the Criminal Law.’ (2011) 75 *Journal of Criminal Law* 309; Simpson (n 34) 101.

choice'.¹⁶³ It has been suggested by some that non-disclosure of HIV status, particularly where such an issue is raised by the complainant, might prevent consent being reached "by choice".¹⁶⁴ Clough claims that there are arguably grounds for categorising "stealth" (the intentional removal of condoms without agreement)¹⁶⁵ as impeding consent.¹⁶⁶ If this is accepted then, it might be argued, that deliberately misleading a partner about other means of HIV prevention, such as TasP, impedes consent and that to only prosecute transmission where it occurs leaves too significant a role to luck.¹⁶⁷ However, it has also been observed that there is a physical difference between sex involving a barrier and sex without,¹⁶⁸ which is not the case in (hypothetical) TasP deception cases. Nevertheless, there are some similarities between the two situations, particularly relating to the defendant's knowledge and state of mind, which warrant consideration.

In the broader context of what has come to be termed "sexual fraud" or "sex-by-fraud", an issue which has gained prominence in light of gender identity fraud cases,¹⁶⁹ the emphasis on freedom and capacity to choose takes on an additional significance. As noted above, in *Clarence*, the decision by the Court for Crown Cases Reserved distinguished between different categories of harm. Although this approach was supplanted by *Dica*, in that case too distinctions were made

¹⁶³ Sexual Offences Act s.74.

¹⁶⁴ Simpson (n 34) 101–102.

¹⁶⁵ Joseph Brennan, 'Stealth Breeding: Bareback without Consent' (2017) 8 *Psychology and Sexuality* 318.

¹⁶⁶ Amanda Clough, 'Conditional Consent and Purposeful Deception' (2018) 82 *The Journal of Criminal Law* 178, 187–189.

¹⁶⁷ Clough (n 166) 187–189.

¹⁶⁸ Alexandra Brodsky, "'Rape-Adjacent': Imagining Legal Responses to Nonconsensual Condom Removal' (2017) 32 *Columbia Journal of Gender and Law* 183.

¹⁶⁹ Discussed below at 2.7.

between consent to physical harm and consent to sexual activity. It might be observed that the continuing impact of *Clarence* can be seen in debates surrounding sexual fraud, in particular in debates over “seduction”. On the one hand, Hyman Gross suggests that extending the criminal law to cover ‘swindling’ and ‘gambits in a game of seduction’ would represent an overextension of personal moralism in the criminal law.¹⁷⁰ On the other hand, Jonathan Herring argues that this is a ‘rather unpleasant analogy [which] sees women as passive participants’ in sexual encounters.¹⁷¹ Certainly Herring’s argument that to dismiss sexual deceptions as being ‘all part of the sexual game’ is to tacitly state that sexual relationships belong to a part of life where deception is to be expected, if not tolerated, is a compelling one. However, as Herring goes on to acknowledge,¹⁷² the role that fantasy and the idealised partner may have in sexual encounters must also be accommodated, particularly where consent is not made explicitly conditional on a given understanding of facts and circumstance.

“Sexual fraud” might be criticised for being overly contractual and for failing to reflect the highly emotive nature of deception in the context of sexual relationships. Nevertheless, claims such as those by Gross, that ‘[t]reating sex as something to be obtained by a bargain involving representations and promises both misconceives and demeans it’,¹⁷³ also overly reduces the meaning of sex. As such, whilst it would be erroneous to limit analysis of sexual “deceptions” by *only* drawing upon commercial or marketplace models, repeating an error seen

¹⁷⁰ Hyman Gross, ‘Rape, Moralism, and Human Rights’ [2007] *Criminal Law Review* 220, in particular, 224-225.

¹⁷¹ Herring (n 1) 129.

¹⁷² Herring (n 1) 129.

¹⁷³ Gross (n 170) 224.

in *Clarence* and artificially limiting the scope of inquiry, it does not follow that drawing upon these concepts within a broader analysis debases or degrades the value of sex and sexuality. As Herring states, 'what sexual intercourse is or means depends on its contexts and the party's appreciation of it'.¹⁷⁴

Acknowledging the multiple, and potentially contradictory, understandings of sex and sexuality that exist need not involve some of these understandings being prioritised over others. Bohlander has suggested that reducing the requirement for active disclosure on the part of people living with HIV might be described as 'the interests of one sector of society, small or large, [being] given unqualified precedence over the interests of other groups and society as a whole'.¹⁷⁵ But, this argument fails to adequately distinguish between reducing requirements for disclosure, generally, and reducing requirements for (pro-)active disclosure. Reducing the latter arguably does not result in a form of 'unqualified precedence' for those people living with HIV ("PLWHIV"). Instead, it may be an acknowledgement that the interests of society as a whole cannot be served by a single unitary moral and ethical framework, or a single approach to disclosure.

Drawing on marketplace principles of representations and promises involves, in part, analysing the defendant's state of mind. Theft and fraud offences both place an emphasis on the defendant's *dishonesty*,¹⁷⁶ which the marketplace analysis of "sexual fraud" echoes. For instance, Slater argues in favour of an expanded approach to HIV criminalisation that would effectively criminalise non-disclosure

¹⁷⁴ Herring (n 1) 130.

¹⁷⁵ Michael Bohlander, 'Mistaken Consent to Sex, Political Correctness and Correct Policy' (2007) 71 *The Journal of Criminal Law* 412, 414.

¹⁷⁶ See, for instance, *Fraud Act 2006* s. 2.

of HIV status when this took place within a 'relationship of trust'.¹⁷⁷ Slater states that: '[n]ot all breaches of trust, however morally egregious, are worthy of criminalisation.'¹⁷⁸ As noted above, historically the distinctions drawn between immoral and illegal actions were noted in judicial decisions surrounding disease transmission, notably in *Clarence*. It has been suggested that this historic approach to disease transmission captured a belief that criminal law did not belong 'in the bedroom', a belief which should be criticised for dismissing significant and consequential harms as an unremarkable part of *domestic* life.¹⁷⁹ Whilst recognising the potential for violence and harm in domestic spaces is unquestionably commendable, Slater's approach goes beyond this and is problematic for two key reasons.

Firstly, Slater claims that within certain relationships there is a social value in parties being able to trust one another and dispense with elements of due diligence by relying on trust. Consequently, he holds that where there are 'good reasons for trusting the other party of which the trusting party is aware, explicitly or tacitly' then it is justifiable for the law to intervene were '*the legal reinforcement of that trust seeks to prevent a personal and societal harm*'.¹⁸⁰ However, this is itself an oversimplification of the nature of trust and would arguably involve, in practice, drawing upon the 'exclusivity and relative permanence' of relationships rather than the specific interpersonal dynamics, of trust and other factors, within them.¹⁸¹ As such, whilst this would overcome the objections that the criminal law

¹⁷⁷ Slater (n 162), in particular, 334-335.

¹⁷⁸ Slater (n 162) 330.

¹⁷⁹ Spencer, 'Liability for Reckless Infection Pt 2' (n 91).

¹⁸⁰ Slater (n 162) 321-322 (emphasis in original).

¹⁸¹ Ryan, "Active Deception" v Non-Disclosure: HIV Transmission, Non-Fatal Offences and Criminal Responsibility' (n 13) 16; The distinction between 'causal' or commercial sex and sex in a committed relationship is also a feature of Spencer's arguments. See Spencer, 'Liability for

ignores the domestic sphere, it would arguably focus on these domestic spaces to an almost exclusive degree. This would sustain heteronormative and homonormative thinking regarding the value of certain kinds of sex within certain kinds of relationships.¹⁸² Furthermore, exchanging one narrowly applied approach to disease transmission for another, in this way, hardly seems a sustainable approach to law and health.

Secondly, the trust that Slater associates with certain kinds of relationships in fact only focuses upon the trust placed by one party (the HIV-negative partner) in the representations of the other (the HIV-positive partner). The one-directional nature of this trust and the lack of a reciprocal recognition of the trust that someone living with HIV might place in their partner is concerning. Arguably, this bears some relationship to arguments that under an equitable model of sexual ethics we would each have a shared responsibility to ensure that reckless transmission of HIV did not take place.¹⁸³ Counter-claims to this argument have suggested that HIV transmission offences are not merely public health responses, but instead take account of the specific moral wrongdoing of the defendant, irrespective of any unwise or reckless behaviour by the complainant.¹⁸⁴ However, if trust is central to this moral wrongdoing, as Slater argues, this necessarily involves inspecting the balance of responsibilities and expectations to which trust is attached.

Reckless Infection Pt 2' (n 91); on which see Weait, 'Harm, Consent and the Limits of Privacy' (n 90) 15.

¹⁸² Sharon Cowan, 'Offenses of Sex or Violence? Consent, Fraud, and HIV Transmission' (2014) 17 *New Criminal Law Review* 135, 160; see, also, Rubin (n 89) for discussion of the sexual hierarchy and heteronormativity.

¹⁸³ On which, see Burris and Weait (n 139).

¹⁸⁴ Herring summarises such arguments, see Herring (n 1) at 83.

The suggestion that those who are HIV-negative have a responsibility shared with those who are HIV-positive, a position which has been advocated by several authors,¹⁸⁵ has often been interpreted as placing unwarranted obligation on the former. Spencer's arguments that HIV-negative partners should be under no obligation to 'cross-examine him each time they go to bed' might be considered an example of such a claim.¹⁸⁶ However, such arguments often fail to acknowledge the fundamentally social nature of HIV transmission, which by its nature involves two or more individuals interacting with one another.¹⁸⁷ Placing most, if not all, responsibility for preventing HIV transmission on the shoulders of those already living with HIV is not only dubious as a public health response to HIV given the potential for misunderstanding and miscommunication,¹⁸⁸ it is also questionable as a legal response to HIV. Rather than acknowledging the plural responsibilities surrounding sexual health and the distinctions between moral and ethical obligations and the law, the criminal law in England and Wales, it might be argued, reinforces an individualistic and stigmatising approach in its construction of legal responsibility.

2.5 Responsibilisation and Risk

The import of moral and ethical concepts of responsibility has a significant impact on the construction of not only legal responsibility, but also related concepts such

¹⁸⁵ See, for example, Burris and Weait (n 139) 12.

¹⁸⁶ Spencer, 'Liability for Reckless Infection Pt 2' (n 91).

¹⁸⁷ Brandon Andrew Robinson, 'Doing Sexual Responsibility: HIV, Risk Discourses, Trust, and Gay Men Interacting Online' (2018) 61 *Sociological Perspectives* 383, 387–388; this is, fundamentally, a consequence of the embodied nature of HIV. On which, see Matthew Weait, 'Unsafe Law: Health, Rights and the Legal Response to HIV' (2013) 9 *International Journal of Law in Context* 535, 545–546.

¹⁸⁸ Catherine Dodds, Adam Bourne and Matthew Weait, 'Responses to Criminal Prosecutions for HIV Transmission among Gay Men with HIV in England and Wales' (2009) 17 *Reproductive Health Matters* 135.

as risk and recklessness. As Adam argues, discourses on HIV prevention might be said to draw upon neoliberal principles of ‘informed consent, contractual interaction, and free market choice’ as part of a process of individual *responsibilisation*.¹⁸⁹ Whilst responsibilisation discourses can be seen in several areas of criminal legal theory, including sexual offences unrelated to disease transmission,¹⁹⁰ in transmission cases responsibilisation takes on an additional significance owing to the ‘direct relation between individual action and the safety of the population.’¹⁹¹

Responsibilisation and the construction of the individual as the defining unit of HIV transmission has been a recurring element of responses to HIV since the early stages of the epidemic. Girard and colleagues have suggested that, whilst an ethos of shared responsibility for HIV prevention might be said to have existed during the initial community responses to HIV/AIDS, these dissipated over time, with distinct moral duties dependent upon HIV status emerging.¹⁹² Emphasis on consistent condom use was the hallmark of community responses and subsequent health education campaigns during the early years of the epidemic, where knowledge of transmission routes was at first limited and treatment options ineffective.¹⁹³ However, this universalised approach to responsibility for HIV

¹⁸⁹ Barry D Adam, ‘Constructing the Neoliberal Sexual Actor: Responsibility and Care of the Self in the Discourse of Barebackers’ (2005) 7 *Culture, Health and Sexuality* 333, 333.

¹⁹⁰ See, for example, Vanessa E Munro, ‘Shifting Sands? Consent, Context and Vulnerability in Contemporary Sexual Offences Policy in England and Wales’ (2017) 26 *Social & Legal Studies* 417, in particular at 432; and, also, Dawn Moore and Mariana Valverde, ‘Maidens at Risk: “Date Rape Drugs” and the Formation of Hybrid Risk Knowledges’ (2000) 29 *Economy and Society* 514.

¹⁹¹ Kit Yee Chan and Daniel D Reidpath, ‘“Typhoid Mary” and “HIV Jane”: Responsibility, Agency and Disease Prevention’ (2003) 11 *Reproductive Health Matters* 40, 43.

¹⁹² Gabriel Girard and others, ‘Is HIV Prevention Creating New Biosocialities among Gay Men? Treatment as Prevention and Pre-Exposure Prophylaxis in Canada’ (2019) 41 *Sociology of Health and Illness* 484, 498–499.

¹⁹³ Douglas Crimp, ‘How to Have Promiscuity in an Epidemic’ (1987) 43 *October* 237; David L Chambers, ‘Gay Men, AIDS, and the Code of the Condom’ (1994) 29 *Harvard Civil Rights-Civil Liberties Law Review* 353.

prevention might be considered short-lived.¹⁹⁴ HAART and a degree of “fatigue” over constant condom usage both, it has been suggested,¹⁹⁵ contributed to the development of alternative safer sex practices such as *negotiated safety* – where condom use could be ceased with a regular partner.¹⁹⁶ Scott suggests that this emphasis on ‘partner selection’ resulted in risk reduction strategies based on ‘homespun criteria and strategies’ and a degree of ‘detective mode’ when estimating risk, rather than coherent criteria and genuine inquiry into a partner’s HIV status.¹⁹⁷ Nevertheless, such disclosure and partner selection focused approaches also emphasise the differentiation of responsibilities between those living with HIV and those not.

It might also be suggested that this is indicative of a continuation in a broader shift in attitudes towards disease and disease prevention which occurred across the 20th century. As Brandt has noted, growing biomedical knowledge about the routes of transmission in the early part of the 20th century did not dispel a perception that diseases were the result of ‘the “random” chain of events that brought together a microorganism, a “vector,” and human beings.’¹⁹⁸ However, during the latter half of the century, it can be suggested that this gave way to an emphasis on individual responsibility. Consequently, ill health ‘would now be viewed as a failure to take appropriate precautions against publicly specified

¹⁹⁴ Simoni and Pantalone (n 138).

¹⁹⁵ Byron Carson, ‘The Informal Norms of HIV Prevention: The Emergence and Erosion of the Condom Code’ (2017) 45 *Journal of Law, Medicine and Ethics* 518; Escoffier (n 137) 133.

¹⁹⁶ Kippax and Race (n 74) 3.

¹⁹⁷ J Blake Scott, *Risky Rhetoric: AIDS and the Cultural Practices of HIV Testing* (Southern Illinois University Press 2003) 95–98.

¹⁹⁸ Allan M Brandt, ‘Behaviour, Disease and Health in the Twentieth-Century United States: The Moral Valence of Individual Risk’ in Allan M Brandt and Paul Rozin (eds), *Morality and Health* (Routledge 1997) 56.

risks, a failure of individual control, a lack of self-discipline, an intrinsic failing.¹⁹⁹ Such patterns of responsabilisation went hand-in-hand with a degree of moral judgment, which was of notable prominence in the initial stages of the HIV/AIDS epidemic. Brandt observing that: '[a]ccording to this view, those who are infected are *responsible* for their plight. AIDS is *caused* by a moral failure of the [infected] individual.'²⁰⁰

This approach to disease transmission might be considered emblematic of the (post-)modern "risk society".²⁰¹ The concept of the "risk society" highlights the structural role that risk plays in modern life, particularly in guiding decision making, where the prevention of real or perceived risks is central.²⁰² Responsibilisation can therefore be understood as the development of a particular understanding of risk management, where individuals are 'compelled to prudently manage the institutionally structured and dependent risks of her or his own DIY project of the self'.²⁰³ In the context of HIV prevention, this can be seen in the public health messages that promote self-responsibility for HIV prevention,²⁰⁴ as well as in the deployment of technology such as the internet as a tool to identify and manage risks.²⁰⁵

¹⁹⁹ Brandt (n 198) 64.

²⁰⁰ Brandt (n 198) 69.

²⁰¹ See, generally, Ulrich Beck, *Risk Society: Towards a New Modernity* (Sage 1992).

²⁰² Mads P Sørensen, 'Ulrich Beck: Exploring and Contesting Risk' (2018) 21 *Journal of Risk Research* 6, in particular, at 12; although, whether any risk is truly 'real' is contested. See Gerda Reith, 'Uncertain Times: The Notion of "Risk" and the Development of Modernity' (2004) 13 *Time & Society* 383, 385.

²⁰³ Peter Kelly, 'Youth at Risk: Processes of Individualisation and Responsibilisation in the Risk Society' (2001) 22 *Discourse* 23, 30; see also Hazel Kemshall, 'Crime and Risk: Contested Territory for Risk Theorising' (2011) 39 *International Journal of Law, Crime and Justice* 218, 219.

²⁰⁴ Weait, *Intimacy and Responsibility: The Criminalisation of HIV Transmission* (n 9) 118–120.

²⁰⁵ Mark Davis and others, 'E-Dating, Identity and HIV Prevention: Theorising Sexualities, Risk and Network Society' (2006) 28 *Sociology of Health and Illness* 457.

Such an understanding of risk can be contrasted with historic understanding of disease risk as natural or God-given. In *Clarence*, Stephen J quotes a passage from an earlier judgment, by Hale, and comments on this point:

Upon this Hale (1 P. C. 432) remarks that ... it is hard to discern whether the infection arise from the part or from the contagion in the air. It is God's arrow ... Contagious diseases, as plague, pestilential fevers, small-pox &c., are common among mankind by the visitation of God, and the extension of capital punishments in cases of this nature would multiply severe punishments too far and give too great latitude and loose to severe punishments. ... [Stephen J commenting that] Some of the expressions in this passage would scarcely be employed now, but it may be taken as a caution against wide and uncertain extensions of the criminal law.²⁰⁶

The significance of this transition, from the historic understanding of risk observable in Hale's comments to the post-modern risk centred approach, in the context of HIV prevention discourses is found in the emphasis on identifying and managing particular sites of risk. Worth, Patton and Goldstein emphasise how such approaches to sexual health and the emergence of HIV transmission offences construct those living with HIV as 'vectors' in the transmission of the virus.²⁰⁷ Vectors are a recurring theme in the history of HIV transmission and are one way through which HIV-risk is personified in a risk taking "Other".²⁰⁸ The embodiment of risk in an Other can be seen, for example, in the case of bisexuals. Kagan notes how bisexuals have historically been constructed as vectors of disease transmission between the non-heterosexual and heterosexual sexual communities.²⁰⁹ This construction of bisexuals as a vector of transmission

²⁰⁶ *R v Clarence* (n 9) 40 (Stephen J).

²⁰⁷ Heather Worth, Cindy Patton and Diane Goldstein, 'Reckless Vectors: The Infecting "Other" in HIV/AIDS Law' (2005) 2 *Sexuality Research and Social Policy* 3.

²⁰⁸ On the Other and the Risk Society, see Weait, *Intimacy and Responsibility: The Criminalisation of HIV Transmission* (n 9) 129–130.

²⁰⁹ Dion Kagan, "'Re-Crisis': Barebacking, Sex Panic and the Logic of Epidemic' (2015) 18 *Sexualities* 817, 825.

situates community level transmission of disease with a specific group, who are then linked with transmission risk.

As Weait notes, 'HIV is only ever embodied' in this manner.²¹⁰ Consequently, responsabilisation and the prescription of individual responsibilities are often located only with those living with HIV, or more broadly those engaging in practices understood as "risky", for instance "barebacking".²¹¹ As Kinsman highlights, such discourses often construct sexual promiscuity, and I would add other non-normative sexual practices, as problematic and issues of individual risk taking rather than a feature of the overall sexual community.²¹²

The degree to which these patterns of responsabilisation entail the surveillance and scrutiny, including self-surveillance and self-scrutiny, of individuals and groups demonstrably extends far beyond the scope of criminal law.²¹³ Take, for example, the issue of insurance in the US and UK. Cobb has demonstrated how insurers have surveyed medical records to assess (or attempt to assess) individuals' past "unsafe" sexual practices by noting previous STI diagnosis.²¹⁴ Cobb notes how this and questions about relationship/marital status may reflect a process of assimilation whereby certain categories of gay men – predominantly

²¹⁰ Weait, *Intimacy and Responsibility: The Criminalisation of HIV Transmission* (n 9) 129.

²¹¹ A multifaceted term relating to intentional condomless sex. See Angela Jones, 'Sex Is Not a Problem: The Erasure of Pleasure in Sexual Science Research' (2019) 22 *Sexualities* 643, 646; and, also, Chris Ashford, 'Bareback Sex, Queer Legal Theory, and Evolving Socio-Legal Contexts' (2015) 18 *Sexualities* 195; Brennan (n 165).

²¹² Gary Kinsman, 'Vectors of Hope and Possibility: Commentary on Reckless Vectors' (2005) 2 *Sexuality Research and Social Policy* 99.

²¹³ Jean V. McHale, 'Compulsion, Surveillance, Testing and Treatment: A Truly "Criminal" Matter?' in AM Viens, John Coggon and Anthony S Kessel (eds), *Criminal Law, Philosophy and Public Health Practice* (Cambridge University Press 2013).

²¹⁴ Neil Cobb, 'Queer(Ed) Risks: Life Insurance, HIV/AIDS, and the "Gay Question"' (2010) 37 *Journal of Law and Society* 620, 637–640.

white and socio-economically privileged – are integrated into ‘neoliberal sexual politics’.²¹⁵ Arguello notes that within the risk society, individuals are cast as rational and universalised subjects acting in a risk averse manner and that, consequently, this serves to delegitimise actions which deviate from the *rational* choice to protect one’s own health and take *responsible* steps to avoid or reduce risks.²¹⁶ Similarly, O’Malley argues that the process of responsabilisation can be observed in the creation of at-risk communities, which can be targeted with messages that it is their “responsibility” to manage risk, and that “[p]recautionary medical tests for a multitude of diseases or malfunction become a duty of those in high risk groups’.²¹⁷ This focus on the identification and differentiation of those participating in “good” acceptable sexual practices,²¹⁸ from those participating in “abnormal” and/or “risky” sexual practices, and the expectation of the freedom and capacity to choose not to engage in the latter can be observed not only in the case law on HIV transmission discussed above, but also in the recent case law on “sexual fraud” relating to gender identity.

2.6 “Sexual Fraud” and Conditional Consent: Gender Identity and HIV Transmission Cases

Gender “deception”, involving a defendant who, at the time of sexual activity with the complainant, identified as a different gender to that assigned at birth and did not disclose this information, has become a significant and pressing issue of criminal jurisprudence over the past decade. A series of cases, most significantly

²¹⁵ Cobb (n 214) 645.

²¹⁶ Tyler M Argüello, ‘Fetishizing the Health Sciences: Queer Theory as an Intervention’ (2016) 28 *Journal of Gay and Lesbian Social Services* 231, 239–240.

²¹⁷ Pat O’Malley, *Risk, Uncertainty and Government* (GlassHouse Press 2004) 72–73, 175.

²¹⁸ See Rubin (n 89).

McNally,²¹⁹ *Wilson*,²²⁰ and *Newland*,²²¹ have demonstrated the development of a concept which some have termed “sexual fraud”.²²² Each of these cases addressed the impact that the defendant’s gender identity history, and the complainant’s apparent lack of knowledge concerning this, on the complainant’s consent. In *McNally*, the CoA did not approach these issues via the conclusive presumptions found in s.76 Sexual Offences Act 2003, discussed above,²²³ instead determining that this information was relevant to the complainant’s general capacity and freedom to consent under s.74. Lord Justice Leveson stated:

[T]he sexual nature of the acts is, on any common sense view, different where the complainant is deliberately deceived by a defendant into believing that the latter is a male ... [the complainant] chose to have sexual encounters with a boy and her preference (her freedom to choose whether or not to have a sexual encounter with a girl) was removed by the defendant's deception.²²⁴

This approach has been subject to significant criticism. Sharpe, in particular, has suggested that requiring transgender individuals to disclose their status, often unprompted, incorporates into the law a construction of transgender identities as inherently unstable and assumes transgender individuals to be continually uncertain about their own identification.²²⁵ It also draws upon a particular understanding of *deliberate deception* within which it is presumed that transgender defendants are not only deceiving themselves in their identification

²¹⁹ *R v McNally* [2013] EWCA Crim 1051.

²²⁰ *R v Wilson (Chris)* [2013] (Unreported).

²²¹ *R v Newland* [2017] (Unreported); see Gabriella Swerling, ‘Gayle Newland, Who Posed as Man, Jailed Again after Sex Assault Retrial’ *The Times* (London, 30 June 2017).

²²² Sharpe, ‘Expanding Liability for Sexual Fraud Through the Concept of ‘Active Deception: A Flawed Approach’ (n 12).

²²³ Sexual Offences Act, s.76.

²²⁴ *R v McNally* (n 219) [26] (Leveson LJ).

²²⁵ Sharpe, ‘Expanding Liability for Sexual Fraud Through the Concept of ‘Active Deception: A Flawed Approach’ (n 12).

but are also aware that every sexual partner they have holds a substantial interest in their gender identity. Sharpe argues that this indicates a belief that '[a]pparently, the transgender person who believes that a cisgender person might actually want to have sex with him/her even if aware of his/her transgender status is by definition a fraud.'²²⁶

Such an approach highlights the often-asymmetrical approach to sexual consent seen in legal analysis – whereby one participant is seen as the active instigator, proposing sexual conduct, and one is seen as a passive respondent, accepting or rejecting a particular advance.²²⁷ The limitations of this analysis can be observed in cases such as *McNally* as well as in the range of cases addressing HIV transmission. Although *Konzani* does establish that complainants might become informed through context, the extremely limited situations in which this exception to the general rule applies – as well as the continued focus on the reasonableness of the defendant's belief where it does – emphasises the one-sided focus of legal scrutiny in these cases. In both instances, the categorisation of the defendant as actively deceptive where they “conceal” their HIV status or previous gender identity is an oversimplification of the various representations, assumptions and implications that occur during sexual encounters.²²⁸ Gibson highlights that equating deception and mistake assumes a particular relationship of power of the defendant over the complainant, suggesting that the defendant's blameworthiness may be diminished or non-existent where a complainant forms

²²⁶ Sharpe, 'Sexual Intimacy, Gender Variance, and Criminal Law' (n 12) 386.

²²⁷ Tanya Palmer, 'Distinguishing Sex from Sexual Violation' in Alan Reed and others (eds), *Consent: Domestic and Comparative Perspectives* (Routledge 2017).

²²⁸ Note the statement by Judge LJ that '[s]ilence in these circumstances is incongruous with honesty': *R. v Konzani (Feston)* (n 106) [42] (Judge LJ); see Ryan, "Active Deception" v Non-Disclosure: HIV Transmission, Non-Fatal Offences and Criminal Responsibility' (n 13) 17.

a belief 'unilaterally'.²²⁹ Gibson goes on to claim that such issues may be particularly noticeable in relation to issues of gender identity and sexuality, where cisnormativity and heteronormativity might produce assumptions which contrast with the genuine and authentic self-identification of defendants.²³⁰

Others have argued that the defendant's non-disclosure of information pertinent to the complainant's consent is less justifiable where the defendant is aware of this situation. Clough, in particular, has stated that '[i]t is for the accused's gain, and only their gain, if the reason for non-disclosure is that they are fully aware that the victim would be unlikely to consent if they knew the truth.'²³¹ Although recognising that disclosure of previous gender identity may be emotionally challenging, Clough argues that McNally demonstrated an awareness that the complainant's consent was conditional upon the assumption that McNally was male, and therefore actively decided not to disclose that information.²³² This concept of "conditional consent" has been a subject of significant academic commentary in recent years. Fischel, for instance, has argued that although "[e]xplicitly conditional consent" is perhaps a rather ridiculous notion' is the 'least-bad solution' to the issue of deceptive sexual relationships.²³³ The idea that the criminal law should only intervene where one party explicitly identifies whatever fact their consent is conditional upon might resolve concerns such as Gibson's that the law otherwise relies on cisnormative assumptions.²³⁴ Indeed Sharpe has

²²⁹ Matthew Gibson, 'Deceptive Sexual Relations: A Theory of Criminal Liability' (2020) 40 *Oxford Journal of Legal Studies* 82, 88–89.

²³⁰ Gibson (n 229) 89–92.

²³¹ Clough (n 166) 186.

²³² Clough (n 166) 190.

²³³ Joseph J Fischel, *Screw Consent: A Better Politics of Sexual Justice* (University of California Press 2019) 96.

²³⁴ Gibson (n 229) 91.

expressed concern that transgender individuals are called upon to internalise these beliefs, precluding them from 'legitimately imagin[ing] him/herself to be the object of another's desire'.²³⁵ However, I would suggest that Clough's argument overstates the extent to which McNally was aware of any assumption on the part of the complainant and, to some extent, positions the complainant as a passive participant rather than an equal partner. As Sharpe highlights, moral expectations and assumptions play a significant role in the Court's approach to categorising particular behaviour as culpable, with a particular emphasis on the principle of trust.²³⁶ Although the CoA determined that, as a matter of law, McNally had not committed an abuse of trust; this was largely owing to the narrow legal definition of trust in the context of sexual relationships.²³⁷

Similarly, the idea of conditional consent and trust has arisen in discussion of HIV transmission offences. However, placing responsibility on the complainant in transmission cases has been subject to significant academic criticism,²³⁸ which might be said to have undermined the salience of such arguments in transmission cases. Cherkassky, for instance, argues that the acknowledgement in *Konzani* that a defendant might have reasonably believed the complainant was consenting without directly disclosing their status places too significant a burden on complainants to inquire about HIV status and allows a defendant to be 'completely reckless' and yet not culpable.²³⁹ Elsewhere, I have been critical of

²³⁵ Alex Sharpe, 'The Ethicality of the Demand for (Trans)Parenthood in Sexual Relations' (2017) 43 Australian Feminist Law Journal 161, 170.

²³⁶ Sharpe, 'Expanding Liability for Sexual Fraud Through the Concept of 'Active Deception: A Flawed Approach' (n 12).

²³⁷ *R v McNally* (n 219) [49]-[51].

²³⁸ Spencer, 'Liability for Reckless Infection Pt 2' (n 91).

²³⁹ Lisa Cherkassky, 'Being Informed: The Complexities of Knowledge, Deception and Consent When Transmitting HIV' (2010) 74 The Journal of Criminal Law 242, 254.

such a claim,²⁴⁰ arguing that this does not reduce the obligation to disclose but merely acknowledges that disclosure may take place through a third-party or through some indirect means such as a dating application profile.²⁴¹ Even if Cherkassky's argument that it is improper for significant responsibilities of investigation or inquiry to be placed on a complainant is generally accepted; there is arguably a need to acknowledge that this may not apply in specific contexts, particularly where there is a perceived responsibility on the HIV-negative to engage with available sexual health information.

Distinctions must be highlighted, however, between the approach taken in the gender identity cases discussed above and HIV transmission offences. In particular, although it has been suggested that *EB* retained the possibility that active deception regarding HIV status might vitiate consent to sexual activity, generally,²⁴² it has been consistently held that non-disclosure of HIV status will not do so.²⁴³ The decision by the Court of Appeal not to do so even in the case of *Rowe*, which involved active and malicious deception,²⁴⁴ discussed below, emphasises this distinction. As such, it might be suggested that the position first taken in *Dica* to treat HIV transmissions only as an offence against the person is now conclusive, unless, in future, Parliament decides to intervene. Nevertheless, the concept of "sexual fraud" developed in these cases arguably has some significance to the HIV and STI transmission offences going forward. As Ryan

²⁴⁰ Cameron Giles, 'Digital Disclosure: HIV Status, Mobile Dating Application Design and Legal Responsibility' [2020] Information and Communications Technology Law.

²⁴¹ Ryan, 'Disclosure and HIV Transmission' (n 55); Weait, *Intimacy and Responsibility: The Criminalisation of HIV Transmission* (n 9) 191.

²⁴² *R v EB* (n 160); Ryan, "'Active Deception" v Non-Disclosure: HIV Transmission, Non-Fatal Offences and Criminal Responsibility' (n 13).

²⁴³ See *R v Dica* (n 80); and, *R v Konzani (Feston)* (n 106).

²⁴⁴ *R v Rowe* (n 161).

has noted,²⁴⁵ there may be an ‘over-creativity in finding active deception’ in both sexual fraud and HIV transmission cases, resulting in the potential for significant over-criminalisation. Drawing on the analysis of sexual fraud and conditional consent discussed above, such concerns again highlight the complexity of the distinction between acts and omissions, a point which has roots in transmission cases going back to the time of *Clarence*.²⁴⁶

2.7 Active “Deception”, Omissions, and Evidence of Fact

The act/omission distinction in English criminal law is an issue of continued academic commentary and debate. As Herring notes,²⁴⁷ debate over our general duty to act and concern over the law over criminalising what are, in essence, moral or ethical obligations have been frequent issues in such discussions. Traditionally, it has been understood that omissions only constitute a criminal offence where there is a pre-existing duty to act, although this does not preclude the influence of perceived moral duties – which can in some instances shape culpability.²⁴⁸ In the context of HIV transmission and other “sexual fraud” cases, such as those discussed in the previous section, the extent to which “deception” as to information “material” to the complainant’s consent come to be placed on the ‘active side’ of this act/omission binary is significant.²⁴⁹ As Weait highlights, the prosecution case in *Konzani* drew heavily on the idea that the defendant ‘gave

²⁴⁵ Ryan, “‘Active Deception’ v Non-Disclosure: HIV Transmission, Non-Fatal Offences and Criminal Responsibility’ (n 13) 17–19.

²⁴⁶ For instance, Wills J discusses ‘the procurement of intercourse by suppressing’ facts, which arguably demonstrates a similar differentiation of active suppression and the omission of non-disclosure. See *R v Clarence* (n 9) at 29 (Wills J).

²⁴⁷ Herring (n 1) 26–37.

²⁴⁸ John Kleinig, ‘Criminal Liability for Failures to Act’ (1986) 49 *Law and Contemporary Problems* 161, 162, 180; see also, Mark Dsouza, ‘Beyond acts and omissions: remark-able criminal conduct’ [2020] *Legal Studies*.

²⁴⁹ Sharpe, ‘Queering Judgment’ (n 12) 420.

certain implicit guarantees about himself', which the complainants trusted.²⁵⁰ Evidence which supports prosecution claims such as these, particularly where such evidence suggests a deliberately deceptive act on the defendant's part, is likely to carry significant weight in relation the defendant's culpability.

Given the developments in the treatment and prevention of HIV since *Konzani*, such issues are ever more problematic owing to the distinct and differentiated ways in which people living with HIV may now choose to identify.²⁵¹ As Sharpe suggests, where a defendant is aware of his low viral load and the reduced transmission risk resulting from it, but represents that he is HIV-negative, he may be judged more morally (and potentially legally) culpable because of the "active" nature of his deception, despite his efforts in maintaining a low viral load.²⁵² In addition to omissions related to pre-existing duties, Ashworth suggests that another factor influences the categorisation of some omissions as closer to actions than others: opportunity.²⁵³ The basic premise of this point is that we might only be held responsible for omissions where we have the opportunity to act and the capacity to do so; which would preclude, for instance, criminalising failure to act where we are not present at the time or in the place of the event.²⁵⁴ However, such matters might be further complicated in the context of defendants who 'accidentally cause danger and then have a duty to prevent further harm',²⁵⁵ where presence at the time such danger was created may give rise to subsequent duty to act.

²⁵⁰ Weait, *Intimacy and Responsibility: The Criminalisation of HIV Transmission* (n 9) 52.

²⁵¹ Grace and others (n 144).

²⁵² Sharpe, 'Expanding Liability for Sexual Fraud Through the Concept of 'Active Deception: A Flawed Approach' (n 12).

²⁵³ Andrew Ashworth, *Positive Obligations in Criminal Law* (Hart Publishing 2013) 31.

²⁵⁴ Ashworth (n 253).

²⁵⁵ Ashworth (n 253).

Ryan has argued that non-disclosure might be sufficiently distinguishable from active deception in transmission cases, so that the latter might be criminalised but not the former.²⁵⁶ The critical distinction between these two, similar to that in *Konzani* noted above, appears to be the impact of the defendant's own knowledge. As Ryan states:

[I]t is the fact that active deception evidences a more culpable state of mind upon which support for the making of this distinction is mainly based. Indeed it is difficult to see how a claim of consent by the sexual partner to run the risk of infection, or honest belief that such consent existed, could be sustained in the face of proof of active deception.²⁵⁷

However, Ryan also goes on to counter Sharpe's concern about non-disclosing parties who take steps to reduce their viral load. Ryan argues that, the emphasis being on the defendant's culpability, evidence of active deception would not be sufficient to establish recklessness where steps had been taken to reduce infectivity, which would hardly indicate recklessness.²⁵⁸ Given that transmission is a necessary component of reckless transmission cases, I think there is merit in Ryan's arguments on this point. However, I think that in the past such issues have easily been avoided because of the lack of conclusive, or even indicative, objective evidence of the defendant's representations to the complaint.²⁵⁹ Given the proliferation of new forms of evidence, including dating application profiles, I remain concerned that findings of active deception might have an impact in future transmission cases, even where transmission risk itself was low. Such issues are, perhaps, likely to be compounded by *Rowe* where *deliberate* attempted

²⁵⁶ Ryan, "Active Deception" v Non-Disclosure: HIV Transmission, Non-Fatal Offences and Criminal Responsibility' (n 13) 14–15.

²⁵⁷ Ryan, "Active Deception" v Non-Disclosure: HIV Transmission, Non-Fatal Offences and Criminal Responsibility' (n 13) 14–15.

²⁵⁸ Ryan, "Active Deception" v Non-Disclosure: HIV Transmission, Non-Fatal Offences and Criminal Responsibility' (n 13) 15.

²⁵⁹ Ormerod (n 77).

transmission involving active deception did result in a conviction in the absence of transmission itself.²⁶⁰

2.8 Rowe: Intentional and Reckless Transmission

One of the most significant developments in transmission case law since *Dica*, Daryll Rowe was convicted in 2017 in respect of five offences of causing grievous bodily harm by transmission and five counts of attempting to intentionally transmit HIV to sexual partners. As noted above, the case was the first intentional disease transmission case to result in a conviction, indeed the first to be prosecuted in England and Wales, and Rowe was sentenced to life with a minimum term of 12 years.²⁶¹ The case received significant media attention at the time,²⁶² and subsequently has been the subject of a BBC television documentary;²⁶³ however, certain facts of the case warrant repeating.

In April 2015, at a sexual health provider in Edinburgh, Rowe was informed that he had tested positive for HIV. At this point he was advised on how to reduce the risk of transmitting the virus to others, including through the use of condoms, as well as being advised to begin treatment, a consequence of which would be that

²⁶⁰ *R v Rowe* (n 161).

²⁶¹ *R v Rowe* (n 161).

²⁶² Henry Vaughan and Flora Thompson, 'Daryll Rowe: Hairdresser Who Tried to Infect Men from Grindr with HIV Jailed for Life' (*The Independent*, 18 April 2018) <<https://www.independent.co.uk/news/uk/crime/daryll-rowe-latest-life-sentence-hairdresser-hiv-infections-grindr-gay-a8310546.html>> accessed 1 January 2020; see also, Matthew Weait, 'Daryll Rowe Guilty – but Is Criminal Law the Right Way to Stop the Spread of HIV?' (*The Conversation*, 16 November 2017) <<https://theconversation.com/daryll-rowe-guilty-but-is-criminal-law-the-right-way-to-stop-the-spread-of-hiv-85488>> accessed 6 April 2020; Cameron Giles, 'Daryll Rowe's Sentence Could Change the Law's Approach to HIV Transmission' (*The Conversation*, 19 April 2018) <<https://theconversation.com/daryll-rows-sentence-could-change-the-laws-approach-to-hiv-transmission-95307>> accessed 15 August 2018.

²⁶³ Charlotte Charlton, 'The Man Who Used HIV as a Weapon' (*BBC Three*, 15 March 2019).

the risk of transmitting the virus during sex would be ‘dramatically reduce[d]’.²⁶⁴ Rowe initially refused treatment and subsequently, in July 2015, was advised again to initiate treatment when blood tests indicated that his immune system was compromised as a result of the virus. At this stage, it appears Rowe was also advised of the criminalisation of HIV transmission,²⁶⁵ and of “PEP” – a combination of drugs that can be taken post-exposure to HIV which reduce the chance of infection if treatment is initiated within three days of exposure and the course of medication is adhered to for the full course of treatment.

Between then and December 2016 when, following a failure to surrender, he was arrested in the North East of England, Rowe had unprotected sex with multiple sexual partners. Many of these partners were met through online mobile dating applications, predominantly the application Grindr, and digital messages sent between the defendant and several complainants were referred to at trial as evidence of Rowe’s intent. Alongside these messages, Rowe was able to provide ‘no credible explanation for his cutting the tops off of the condoms’ he used with several of the complainants.²⁶⁶

Several of the complainants reported having unprotected sex with other sexual partners during the periods within which they acquired the infection, and the challenge of scientifically establishing that the complainants acquired the

²⁶⁴ *R v Rowe* (n 161) [5].

²⁶⁵ The distinctions between the criminal law in England and Wales when compared to Scotland should be noted here. On which, see Tadros (n 75); Chalmers (n 76); Ryan, ‘Risk-Taking, Recklessness and HIV Transmission: Accommodating the Reality of Sexual Transmission of HIV within a Justifiable Approach to Criminal Liability’ (n 103); for a summary of early case law in both jurisdictions, see Catherine Dodds and others, ‘Grievous Harm? Use of the Offences Against the Person Act 1861 for Sexual Transmission of HIV’ (2005).

²⁶⁶ *R v Rowe* (n 161) [64].

infection from the defendant were noted.²⁶⁷ As others have highlighted,²⁶⁸ although genetic analysis is able to demonstrate that two infections are closely related, it is not able to determine causative relationships, including the direction of transmission, and certainly not to the criminal standard. Expert evidence in *Rowe* concluded that, in relation to the infections that were the subject of the s. 18 charges, the infections were part of the ‘same infection cluster’ suggesting a common ‘connection between the men in Brighton and in Scotland’, where Rowe had resided.²⁶⁹

Rowe’s initial decision not to begin a treatment regime and subsequent failure to adhere to a treatment regime after instigating one, were also noted within the judgment. Treatment was framed within the judgment as one means of ‘assert[ing] control over the virus’ along with disclosure, the use of condoms, and post-exposure disclosure to facilitate the uptake of PEP.²⁷⁰ Lack of adherence was identified as a cause for concern due to the possible resistance to effective treatment options which it can result in,²⁷¹ as well as the immediate impact it can have on viral load – the level of the virus present in the blood. On this point, one section of the judgement stands out:

... If the viral load is below 40 the virus would be considered undetectable and there is little risk of passing it on. If an individual stopped taking antiretroviral medication their viral load would increase within a matter of weeks. An individual would not know how infectious they were and only a blood test could reveal it. Tests on the applicant showed that the virus was

²⁶⁷ *R v Rowe* (n 161) [23].

²⁶⁸ See, for example, Weait, *Intimacy and Responsibility: The Criminalisation of HIV Transmission* (n 9) 100–101; Udo Schüklenk, ‘Should We Use the Criminal Law to Punish HIV Transmission?’ (2009) 4 *International Journal of Law in Context* 277; Hughes, ‘The Criminal Transmission of HIV: Issues with Condom Use and Viral Load’ (n 11) 118.

²⁶⁹ *R v Rowe* (n 161) [29].

²⁷⁰ *R v Rowe* (n 161) [65].

²⁷¹ *R v Rowe* (n 161) [11].

not detectable between 4 April 2016 and 22 July 2016 because his viral load was under 40 but he was potentially infectious at other times.²⁷²

Rowe's defence – which primarily related to a claim by the defendant that he believed himself to be cured of the infection – did not at any stage claim, or more broadly refer to the possibility, that the complainants consented, either to the risk of transmission or to transmission itself.²⁷³ As the first case of intentional transmission it is significant, in and of itself, that consent was not discussed to the extent that it was in earlier case law, most prominently *Dica* and *Konzani*, if only to suggest that the present approach to consent set out in those cases appears to be firmly established to the extent that it was not key to any of the grounds of appeal in *Rowe*.

It might also be suggested that this was a practical consequence of the extensive evidence that Rowe deliberately deceived his partners as to his HIV status. This supports Ryan's claim, noted above, that evidence of active deception undermines the possibility of consent-based defences.²⁷⁴ Rowe's case did not feature the HIV disclosure features discussed here, which were only beginning to feature on the applications Rowe used at the time he was arrested. Nevertheless, application use was a significant feature of the case, with the defendant meeting several of the complainants via *Grindr* and other applications.²⁷⁵ Messages of a graphic nature, including those where Rowe taunted the complainants and

²⁷² *R v Rowe* (n 161) [28].

²⁷³ Whether the latter would indeed be possible given the limitation of *Brown* is itself an underexplored issue. See *R v Brown* (n 59).

²⁷⁴ Ryan, "Active Deception" v Non-Disclosure: HIV Transmission, Non-Fatal Offences and Criminal Responsibility' (n 13) 15.

²⁷⁵ *R v Rowe* (n 161) [14]-[19].

subsequently disclosed that he was HIV+ were critical to the prosecution's case.²⁷⁶

The specific facts of *Rowe*, in particular the nature and extent of these messages and the extent to which Rowe refused and later did not adhere to treatment to the detriment of his own health, and, perhaps less unique but still unusual,²⁷⁷ intentional damage to condoms, mark out *Rowe* as an unusual case. It is, perhaps, unlikely that cases with similar facts will arise again, given that they necessarily involve individuals discontinuing, or not instigating, lifesaving treatment.²⁷⁸ However, what was not established in *Rowe*, it is argued, and what is of critical importance in the development of the concept of criminal responsibility *vis* issues of bodily autonomy, disease transmission and sexual consent, is why both the intentional transmission of HIV and attempted transmission of HIV were (and that they were is not specifically disputed here) *intentional* and *attempted* transmissions. What this piece will go on to argue, below, is that the unusual and perhaps somewhat startling facts of *Rowe* have resulted in a missed opportunity to establish a clearer framework of criminal responsibility in relation to disease transmission and sexual health which, in the context of an evolving socio-medical environment of HIV treatment and prevention discussed above,²⁷⁹ presents a critical challenge to modern criminal law.

²⁷⁶ *R v Rowe* (n 161) [14].

²⁷⁷ See Brennan (n 165); and, for legal analysis, Brodsky (n 168).

²⁷⁸ Giles (n 262).

²⁷⁹ Including, in particular, the evolving role and understanding of PrEP. On which, see Mowlabocus (n 147); Maine (n 147).

2.9 Concluding Remarks

In this chapter, I have set out the background on HIV transmission offences in England and Wales. In the first section, I introduced *Clarence* and other 19th century cases which governed disease transmission criminalisation, or more accurately non-criminalisation, over the 20th century. I highlighted how the historic understanding of transmission risk and sex's close association with the institution of marriage obscured the broader legal issues of what constitutes harm and what obligations we owe our sexual partners by way of information disclosure prior to sex. It is significant, of course, that the primary statute by which HIV transmission came to be criminalised pre-dates the emergence of HIV/AIDS by over 100 years and, as with reform to the Offences Against the Person Act more widely,²⁸⁰ it is questionable whether these provisions are fit for purpose in the modern world. Following this introduction, I turned to the specific cases of *Dica* and *Konzani* and discussed the manner in which culpability in those cases is closely linked with the defendant's apparent knowledge, the complainant's vulnerability to deception and the principle that non-disclosure violated the trust that the complainants placed in *Dica* and *Konzani*.

I then considered the developments seen in the treatment and prevention of HIV since the time of *Dica* and *Konzani*, suggesting that the emergence of *Treatment as Prevention*, in particular, as well as the increased availability of PrEP have the potential to significantly alter the debate over the justifications of transmission criminalisation. I agreed with Weait's statement that laws on HIV transmission 'frequently express an explicit moral agenda and exist as a means of enforcing

²⁸⁰ See, generally, The Law Commission, *Reform of Offences Against The Person* (n 111).

and reinforcing particular cultural and social norms and values.²⁸¹ Discussing these values, including trust and responsibility, I highlighted the individualistic nature of these concepts. I emphasised that debate on HIV transmission risk frequently makes connections between the actions of individual people living with HIV and broader concerns around public health. I suggested that the uneven distribution of responsibility for HIV prevention between people living with HIV and the HIV-negative was a cause for concern and is consequential in how those living with HIV are framed within the law.

Following this, I provided an account of the concept of “sexual fraud”. Discussing the case law on gender identity “deception” seen in recent years, I argued that the development of this concept was significant given its potential influence in HIV transmission cases. In particular, the distinction between active deception and non-disclosure seen in those cases and the impact that this distinction has on the act/omission binary might, I would suggest, have some relevance in HIV transmission cases. The complexity of establishing both objective facts and subjective understanding in HIV transmission cases was noted by Ormerod even before *Dica*, in 2001.²⁸² However, given the emergence of new forms of evidence, such as dating applications, which might more overtly demonstrate defendants’ (mis)representations – the impact of evidence that might be used to demonstrate defendants’ culpability arguably warrants further academic and legal attention, which the remainder of this thesis aims to address.

²⁸¹ Weait, ‘Unsafe Law: Health, Rights and the Legal Response to HIV’ (n 187) 539.

²⁸² Ormerod (n 77).

Chapter 3: Research Methodology and Method

3.1 Introduction

Exploring the social and contextual expectations and knowledge which feature in academic debates surrounding the criminalisation of HIV transmission and addressing the role of dating application profiles as a potential source of evidence in criminal proceedings presented several methodological challenges. Not only is the subject matter of this project highly personal and sensitive, but the objective of investigating the *contextual meanings* and *expectations* of HIV transmission risk, disclosure, and responsibility warranted a data collection method which was similarly contextualised.¹ With this in mind, this chapter first explains my overall theoretical perspective before then addressing the methodologies relevant to this project. I then turn to the specific methods used for data collection, which used visual elicitation as part of a qualitative online survey, before then discussing the actual process of data collection and analysis.

As noted in Chapter 1, there has not, to date, been empirical research into the impact of application disclosure features from a criminal law perspective in England and Wales. Given this, along with the relative lack of research into online disclosure from a legal perspective, more generally, a more novel approach to data collection was necessary. Given this lack of prior research, it seemed appropriate to adopt a qualitative approach, which would allow emerging issues

¹ Kazmer and Xie discuss the concept of 'contextual naturalness' in internet based interviews. Whilst the approach taken here differs in some respects from internet based interviews because of specific ethical concerns, discussed below, the objective of maintaining a contextual similarity remains similar. See Michelle M Kazmer and Bo Xie, 'Qualitative Interviewing in Internet Studies: Playing with the Media, Playing with the Method' (2008) 11 *Information Communication and Society* 257; and, for a more recent application of this approach, Dan Michael Fielding, 'Queernormativity: Norms, Values, and Practices in Social Justice Fandom' [2020] *Sexualities*.

to be identified and analysed.² A qualitative approach seemed the most appropriate way to facilitate the exploration of participants' understanding of these features and provide a basis for future research, including potential quantitative/mixed methods research into specific behaviours and practices.³ In reaching this decision, I was influenced to some extent by existing literature which does address online disclosure from a social or cultural perspective.⁴ This literature proved invaluable during the planning stages of the project, where it aided in the development of the visual elicitation stimuli materials employed here.

Given the focus on participants' contextual understanding, the constructionist epistemological approach taken in this project, which emphasises 'the collective generation [and transmission] of meaning' and 'the hold our culture has on us',⁵ is perhaps unsurprising. Whilst some authors draw a distinction between constructivism on the one hand, focusing on the 'individual mind' and the construction of meaning within it, and constructionism, emphasising the social construction of meaning, on the other,⁶ such distinctions are not replicated by all authors.⁷ Furthermore, some position constructionism as an overarching term or

² Crotty notes that researchers rarely begin with a fully formed research philosophy in mind, instead focusing on a particular problem they seek to address. See Michael Crotty, *The Foundations of Social Research* (Sage 1998) 13.

³ It did not seem appropriate to adopt a quantitative approach for this project. Although specific issues guided the research design, these were not readily reducible to variables in the manner necessary for quantitative work. For discussion of the limitations of quantitative research, generally, see Lisa Webley, 'Qualitative Approaches to Empirical Legal Research' in Peter Cane and Herbert Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (OUP 2010).

⁴ See, in particular, Kane Race, 'Click Here for HIV Status: Shifting Templates of Sexual Negotiation' (2010) 3 *Emotion, Space and Society* 7; Brandon Andrew Robinson, 'Doing Sexual Responsibility: HIV, Risk Discourses, Trust, and Gay Men Interacting Online' (2018) 61 *Sociological Perspectives* 383.

⁵ Crotty (n 2) 58 ('[and transmission]' in original).

⁶ Crotty (n 2) 57-58.

⁷ For instance, Braun and Clarke speak only of constructionism, although they also highlight contextualism, which might be seen as a form of 'constructionism-[very]-lite': Virginia Braun and Victoria Clarke, *Successful Qualitative Research* (Sage 2013) 30 (emphasis in original).

as an ontological position, rather than an epistemological one,⁸ and there have been some who suggest that applying a critical approach involves separate considerations from constructionist research.⁹ I would argue, however, that attempting to draw too fine a distinction between these approaches is ultimately unhelpful and, instead, it is important to consider the philosophical foundations of this work more holistically.

The importance of such considerations is apparent when examining the vignette technique set out across this chapter. The use of the vignette method in this project is driven by the assumption that knowledge cannot be non-situational.¹⁰ Vignettes employ short stories or other stimuli,¹¹ in this project stories and visual stimuli, to elicit responses from participants. Barter and Renold argue that such methods are effective at capturing beliefs and attitudes, particularly in relation to everyday occurrences experienced by participants, whilst also facilitating the exploration of sensitive and personal topics.¹² Wilks notes that there are 'obvious questions about the extremely complex relationship between reports of behaviours and the behaviours themselves' and that '[t]here is no guarantee that the responses to a given vignette will in some way mirror actual behaviour of the respondent'.¹³ However, Wilks also notes that this limitation is less consequential

⁸ Crotty (n 2) 58.

⁹ Salma Patel, 'The Research Paradigm – Methodology, Epistemology and Ontology – Explained in Simple Language' (*Salma Patel*, 15 July 2015) <<http://salmapatel.co.uk/academia/the-research-paradigm-methodology-epistemology-and-ontology-explained-in-simple-language/>> accessed 31 May 2019.

¹⁰ Janet Finch, 'The Vignette Technique in Survey Research' (1987) 21 *Sociology* 105, 105–106.

¹¹ Douglas Harper, 'Talking about Pictures : A Case for Photo Elicitation' (2002) 17 *Visual Studies* 13; Tjitske de Groot and others, 'Using Visual Vignettes to Explore Sensitive Topics: A Research Note on Exploring Attitudes towards People with Albinism in Tanzania' [2020] *International Journal of Social Research Methodology*.

¹² Christine Barter and Emma Renold, 'The Use of Vignettes in Qualitative Research' [1999] *Social Research Update*.

¹³ Tom Wilks, 'The Use of Vignettes in Qualitative Research into Social Work Values' (2004) 3 *Qualitative Social Work* 78, 82.

if the focus of the study relates to beliefs and values, where vignettes might be judged by their ‘meaningfulness’ to participants.¹⁴ Similarly, Crafter and colleagues argue that vignettes do not act as an exact stage for recreating “what participants would actually do in a specific situation”¹⁵ but instead allowing participants a space to reflect on their perceptions, thoughts and feelings. From an epistemological standpoint, therefore, the decision to use vignette-type questions early on in the project acted as a catalyst for making the project closer to a *critical constructionist* epistemology. This framework enables the project to explore and ‘interrogate’ the representations elicited by the stimuli.¹⁶

On the basis of this philosophical foundation, the methodological approach of the project, outlined in the next section, took inspiration from the setting it investigates by being similarly digital and visual. These two methodological themes, along with the focus on context dependent knowledge and understanding, led to an online survey being used to share the vignettes with participants. As I go on to discuss in Section 3.3, there were a number of advantages to this approach including that participants’ responses can be presented here verbatim, without the difficulties of transcription. In subsequent chapters, I provide quotations in their original form, with spelling and grammar uncorrected. Minor changes to formatting (such as double spacing) have been made where this was necessary and did not change the meaning of the quotation. The added privacy afforded by online recruitment

¹⁴ Wilks (n 13) 83.

¹⁵ Sarah Crafter and others, ‘Using Vignette Methodology as a Tool for Exploring Cultural Identity Positions of Language Brokers’ (2015) 28 *Journal of Constructivist Psychology* 83, 84–85; Rhidian Hughes and Meg Huby, ‘The Construction and Interpretation of Vignettes in Social Research’ (2004) 11 *Social Work & Social Sciences Review* 36; Niamh Maguire and others, ‘Using Vignette Methodology to Research the Process of Breach Comparatively’ (2015) 7 *European Journal of Probation* 241.

¹⁶ Braun and Clarke, *Successful Qualitative Research* (n 7) 21.

and participation, when compared with face-to-face interviews, further facilitated the exploration of the HIV disclosure features found on applications, arguably a highly sensitive topic, where interviewer effects may be significant. As Holmström *et al* suggest, vignettes are already beneficial in this regard, as ‘[p]articipants who do not want to discuss their personal experiences can respond to those of “others.”’¹⁷ Given the particular sensitivity of HIV and dating application use, the additional privacy and ease of participation which online methods provide seemed eminently suitable given the online nature of applications themselves and the focus on the context within which disclosure and trusting practices arise.

In this introductory section, I have outlined the philosophical foundations of this project. At its core, the methodology and methods detailed below aimed to collect data on how application users create meaning related to the content of application profiles and critically appraise the consequences of this knowledge in the context of legal proceedings in England and Wales.¹⁸ As I go on to conclude at the end of this chapter, I make two primary contributions to socio-legal research methods through this work. Firstly, I demonstrate the application of visual vignette techniques to explore socio-legal issues, drawing on prior sociological and health and social work research. Secondly, I develop the *digital* visual vignette, which might be used to investigate a range of legal issues related to online visual phenomena such as social networking, online communication and application use beyond the dating applications explored here.

¹⁷ Charlotta Holmström, Lars Plantin and Eva Elmerstig, ‘Complexities of Sexual Consent: Young People’s Reasoning in a Swedish Context’ [2020] *Psychology & Sexuality* 5.

¹⁸ In this respect, the project falls within the critical, rather than experiential, camp described in Braun and Clarke, *Successful Qualitative Research* (n 7) 21; Braun and Clarke here build on the work of Reicher, see Stephen Reicher, ‘Against Methodolatry: Some Comments on Elliott, Fischer, and Rennie’ (2000) 39 *British Journal of Clinical Psychology* 1.

3.2 Methodological Themes

As noted above, three methodological themes guided the development of the data collection survey used in this project. These were: the internet as a site of research; visual research methods in social science; and, the use of stories and scenarios to investigate context-related expectations and knowledge. In this section, I explore these three themes, explaining their importance to the design decisions made during the development of the data collection methods discussed in the next section. Prior research into the information included in application profiles, which pre-dates the introduction of the disclosure features considered here, has approached data collection through interviews,¹⁹ observations,²⁰ and ethnographies.²¹ Whilst each of these has their own advantages and disadvantages in terms of ease of participation, research ethics, and overall data collection, through the discussion in this section I establish the particular advantages of the online qualitative survey in achieving the research objectives of this project, whilst also highlighting the limitations of this approach.

3.2.1 *The Internet as a Site of Research*

Widespread internet access, although far from a universal phenomenon, has had a significant influence on the development of social science research, particularly over the last two decades.²² The internet can be positioned as both a tool to be

¹⁹ Rusi Jaspal, 'Gay Men's Construction and Management of Identity on Grindr' (2017) 21 *Sexuality and Culture* 187.

²⁰ Jody Ahlm, 'Respectable Promiscuity: Digital Cruising in an Era of Queer Liberalism' (2017) 20 *Sexualities* 364.

²¹ Christian Phillips, 'Self-Pornographic Representations with Grindr' (2015) 1 *Journal of Visual and Media Anthropology* 65.

²² See, for instance, Alison Evans, Jonathan Elford and Dick Wiggins, 'Using the Internet for Qualitative Research' in Carla Willig and Wendy Stainton-Rogers (eds), *The SAGE Handbook of Qualitative Research in Psychology* (Digital Ed, SAGE Publications 2011).

employed during the investigation of other phenomena, or as the subject of academic investigation in its own right.²³ Research in both instances may draw upon research strategies and methods developed offline, although there is an increased recognition that certain digital methodologies do not necessarily correlate with traditional analogue, offline approaches.²⁴ An issue of longstanding debate in respect of online research is whether participants are more likely to provide false or incomplete information to researchers. Evans *et al* point out that '[o]ne of the major criticisms that is levelled at online research is that we cannot rely on participants to present themselves "truthfully".'²⁵ Similarly, Boellstorff and colleagues note that data collected offline can sometimes be presented as more "authentic" than that collected online.²⁶ Such concerns highlight how online research methods are often pitched against traditional offline methods and positioned as inferior to them, arguably overlooking the importance of acknowledging the major role that the internet has in modern life.²⁷

Furthermore, the broad distinctions made between online and offline research are often overly simplistic. Ashford notes that there is 'increasing acceptance that the Internet itself can be a source of field sites as well as being a tool to examine "virtual" and "real" sites, *however false that dichotomy may be.*'²⁸ Similarly, the

²³ Janet Salmons, *Qualitative Online Interviews* (Sage 2015).

²⁴ Laura Robinson and Jeremy Schulz, 'New Avenues for Sociological Inquiry: Evolving Forms of Ethnographic Practice' (2009) 43 *Sociology* 685.

²⁵ Evans, Elford and Wiggins (n 22) 5; see, similarly, Brian S Mustanski, 'Getting Wired: Exploiting the Internet for the Collection of Valid Sexuality Data' (2001) 38 *Journal of Sex Research* 292, 296–297.

²⁶ Tom Boellstorff and others, *Ethnography and Virtual Worlds: A Handbook of Method* (Princeton University Press 2012) 40–41.

²⁷ Eve Stirling, "'I'm Always on Facebook!'" Exploring Facebook as a Mainstream Research Tool and Ethnographic Site' in Helene Snee and others (eds), *Digital methods for social science: an interdisciplinary guide to research innovation* (Palgrave Macmillan 2016).

²⁸ Chris Ashford, 'Queer Theory, Cyber-Ethnographies and Researching Online Sex Environments' (2009) 18 *Information and Communications Technology Law* 297, 229 (citations omitted, emphasis added).

dichotomy of “virtual” and “real-world” research methods arguably fails to acknowledge that the digital world is interwoven into the physical world, making both “real” to those engaged with them.²⁹ It is from this position that the exclusively online techniques used in this project came to be developed. This approach is not intended to suggest that online methods are inherently superior (or, indeed, inferior) to offline methods, nor to erase the potential for blended methods which challenge the online/offline dichotomy.³⁰ Instead, it is intended to acknowledge that there is nothing inauthentic or lacking in online research which investigates specific online phenomena and field sites through similarly online means.

3.2.1.1 The Everyday Internet

In acknowledging the specificity of the internet as a site of research, three features stand out in relation to this project, the first of which – the everyday, or mundane, nature of internet use – I address here. The HIV disclosure features investigated here, along with application profiles more generally, are typical examples of the participatory nature of everyday internet usage in the 21st century. In contrast to the early years of the internet, when those accessing the internet were predominantly consumers of content, internet usage since the turn of the millennium has placed a greater emphasis on user *participation* in online spaces.³¹ Whether participation in social networking is sufficient to afford the label

²⁹ Tom Boellstorff, ‘For Whom the Ontology Turns: Theorizing the Digital Real’ (2016) 57 *Current Anthropology* 387.

³⁰ Ronald E Hallett and Kristen Barber, ‘Ethnographic Research in a Cyber Era’ (2014) 43 *Journal of Contemporary Ethnography* 306.

³¹ Grant Blank and Bianca C Reisdorf, ‘The Participatory Web: A User Perspective on Web 2.0’ (2012) 15 *Information Communication and Society* 537.

“produser” – a portmanteau of producer (of content) and user – is contestable: Bird, for instance, argues that there is insufficient creativity involved in Facebook posts or tweets.³² Furthermore, online dating applications might be distinguished from social networking sites, because the content which a user “produces” is typically limited to a profile, with a format controlled by the application’s developer.

Cassidy argues that, in the context of Gaydar (an earlier social networking site for men who have sex with men), some users demonstrated ‘participatory reluctance’, leaving sections of profiles blank or partially completed.³³ However, even where there is disengagement of this kind, dating applications might still be compared to other forms of online identity creation and presentation,³⁴ because the nature of these applications emphasises the user’s visibility to others, including through the use of photos and other multimedia. This participatory element, even where users do not go beyond it by uploading content or completing profile information, still serves to undermine the dichotomisation of the online and the offline self. Consequently, the participatory web, even where users’ participation is reluctant, is less a discrete part of the everyday and instead woven into other mundane practices.³⁵

This distinction has several implications for academic research. First, recognition that engaging with the internet is a pervasive part of everyday living necessarily

³² See S Elizabeth Bird, ‘Are We All Producers Now?’ (2011) 25 *Cultural Studies* 502, 512.

³³ Elija Cassidy, ‘Social Networking Sites and Participatory Reluctance: A Case Study of Gaydar, User Resistance and Interface Rejection’ (2016) 18 *New Media and Society* 2613, 2624.

³⁴ On which, see Liam Bullingham and Ana C Vasconcelos, ‘“The Presentation of Self in the Online World”: Goffman and the Study of Online Identities’ (2013) 39 *Journal of Information Science* 101.

³⁵ Blank and Reisdorf (n 31).

suggests that the role of the internet should be considered in every research project, even where the internet is not the primary focus of the investigation. Second, where exclusively online or offline methods are used over a blended method, this warrants justification and an acknowledgement of any limitations this produces.³⁶ Finally, recognising the mundanity of internet usage for many participants should also be considered when developing data collection methods. As I will go on to discuss below, this was one rationale behind the visual vignettes used here. Given that applications are, perhaps, unexceptional to those using them, techniques such as the 'app walkthrough'³⁷ and 'media go-along'³⁸ or methods such as participant diaries³⁹ have some advantages over interviews, where participants may not provide data on unremarkable experiences. However, there are potential privacy concerns with such approaches, given that there is a risk of identifiable non-participant data being referenced in participants' diary responses and walkthroughs may involve researchers observing non-participants as they are taken through the application. Although such concerns can be offset through research design, as in the works cited above, similar concerns relating to participant inhibitions and the sensitive nature of the research topic may be more challenging.

Therefore, in this project, purely online data collection methods were used. These enabled the collection of data without raising privacy concerns, whilst also capitalising on the benefits of online only research and acknowledging specific

³⁶ On this point, see, in particular, Hallett and Barber (n 30).

³⁷ Kath Albury and others, 'Data Cultures of Mobile Dating and Hook-up Apps: Emerging Issues for Critical Social Science Research' (2017) 4 *Big Data & Society* 1, 9.

³⁸ Kristian Møller Jørgensen, 'The media go-along – Researching Mobilities with Media at Hand' (2016) 32 *MedieKultur. Journal of media and communication research* 32.

³⁹ Carl Bonner-Thompson, "'The Meat Market': Production and Regulation of Masculinities on the Grindr Grid in Newcastle-upon-Tyne, UK' [2017] *Gender, Place and Culture*.

limitations which might be addressed by future offline research. Advantages of online-only research, where the issue under investigation is similarly digital, include an increased familiarity to participants, which may lower inhibitions and contribute to more open discussion of complex personal experiences and beliefs.⁴⁰ Online asynchronous research, where researcher and participant do not need to be online at the same time, also enables participants to contribute at a time convenient to them. In contrast, offline or blended data collection would require more personal details to be collected and introduce additional barriers to participation. There are downsides to such methods, particularly the challenge of establishing rapport and putting participants at ease.⁴¹ As detailed below, I attempted to offset these limitations in this project through the recruitment process. Given there were also advantages to online data collection in terms of interviewer and participant mobility,⁴² relevant to the mobile nature of applications which I now turn to, I would argue that any disadvantages to this approach were outweighed in this project.

3.2.1.2 The Mobile Internet

A critical factor in the everyday usage of the internet is the pervasive and mobile nature of internet access through technologies such as smartphones, the proliferation of public wi-fi and availability of high-speed mobile data. This might be considered a further challenge to the online/offline dichotomy, given that users no longer need to be tethered to a desktop computer in order to be “active” online. Stirling notes that on Facebook, for example, a user’s profile might be viewed and

⁴⁰ John Suler, ‘The Online Disinhibition Effect’ (2004) 7 *CyberPsychology & Behavior* 321.

⁴¹ Evans, Elford and Wiggins (n 22) 12–13.

⁴² Evans, Elford and Wiggins (n 22) 12.

interacted with whilst the user is “offline”. Consequently, Stirling argues that research into “online” behaviour might therefore need to address periods when users might not think of themselves as online.⁴³ With social networking sites with their own mobile applications, the distinction between online and offline is most acutely blurred because these applications enable notifications and messages whilst users are mobile. The design of mobile dating applications further complicates this issue, as although these applications prioritise immediate communication, users do remain visible and “online” for a short (or in some instances a significantly longer) period after they have closed the application.⁴⁴ As well as being able to receive messages from previous contacts when offline, this means that users might receive messages from new contacts during a time when they are nevertheless disconnected from the site.

It is also significant that many mobile dating applications do not have a companion website and therefore can only be accessed via a mobile device. At the time of data collection in this project, this included *Grindr*, although subsequently this has seen the introduction of *Grindr Web*.⁴⁵ At the time of data collection, therefore, it could be suggested that the lack of alternate access points distinguished dating applications from social networks. In her 2014 research into Facebook, Stirling noted that 22% of users’ access was through mobile phones,⁴⁶ and whilst a greater proportion of access may now be through mobiles given the

⁴³ Eve Stirling, ‘Using Facebook as a Research Site and Research Tool’ [2014] SAGE Research Methods Cases.

⁴⁴ The exact length of time a profile will remain visible varies between (and possibly within) applications. Hornet, for instance, shows users who were online over a day ago, whereas Grindr typically shows users for only a number of hours.

⁴⁵ Josh Milton, ‘Grindr Web: Here’s How to Use Grindr on Your Computer Desktop’ (*Pink News*, 5 May 2020) <<https://www.pinknews.co.uk/2020/05/05/grindr-web-desktop-computer-laptop-app-what-is-how/>> accessed 5 May 2020.

⁴⁶ Stirling (n 43).

increased affordability of smartphones and mobile data, these services still combine mobile and desktop access. In contrast, where there is a lack of web-based access, dating applications are intrinsically tied to a physical device. This device, in turn, maintains a physical proximity to the user. As such, it might be suggested that Facebook and Twitter might be on a user's mind, but Grindr and Hornet are always in their pocket. The developments seen since data was collected in this project, including the impact of COVID-19 and the lockdown and travel restrictions seen in the UK, mean that future research may wish to consider the extent to which these applications continue to be "mobile".

3.2.1.3 Researching (via) The Internet

The mobile and everyday nature of the internet mean that researching via the internet is now an established technique in both legal and sexualities focused research, including research related to HIV.⁴⁷ The advantages of internet-based research can be both general, in terms of time and cost savings,⁴⁸ or, as is the case here, specifically tied to the research topic. As the aim of this project was to explore the relevance of HIV disclosure on applications to criminal proceedings in England and Wales, this project necessarily had a connection with the internet and, as contextual expectations were critical to this aim, there was an inherent advantage to maintaining a contextual similarity for participants. Still, there are particular challenges to researching via the internet, particularly the lack of an existing relationship between the researcher and prospective participants

⁴⁷ See, for example, Brenda L Curtis, 'Social Networking and Online Recruiting for HIV Research: Ethical Challenges' (2014) 9 *Journal of Empirical Research on Human Research Ethics* 58.

⁴⁸ Rosie Harding and Elizabeth Peel, 'Surveying Sexualities: Internet Research with Non-Heterosexuals' (2007) 17 *Feminism and Psychology* 277.

recruited online, especially where there is not a gatekeeper to the spaces in which recruitment takes place.

Online recruitment techniques can take multiple forms, including the use of emails,⁴⁹ social media posts,⁵⁰ and social networking itself.⁵¹ Often, a broadcasting approach is used, where messages and posts promoting the project are sent out in a fire-and-forget fashion. These attempt to balance the potential benefits of online recruitment (speed, reach and access to harder to engage with populations) with risks such as consent and privacy issues.⁵² However, the effectiveness of this approach can be limited, particularly where prospective participants are likely to be hesitant because of the research topic. It may also disrupt ordinary usage of the online space and prove an inconvenience to other users, which may make further research activities on these spaces more difficult.⁵³ Using networks and other contacts can be an alternative to this approach, where snowball sampling can prove effective as a means of introduction; although as Dietz notes snowballing blurs the ‘distinction between “gatekeepers” and “participants”’.⁵⁴

⁴⁹ Harding and Peel (n 48).

⁵⁰ Curtis (n 47).

⁵¹ Max Morris, “Gay Capital” in *Gay Student Friendship Networks: An Intersectional Analysis of Class, Masculinity, and Decreased Homophobia* (2018) 35 *Journal of Social and Personal Relationships* 1183; Brandon Miller, ‘A Picture Is Worth 1000 Messages: Investigating Face and Body Photos on Mobile Dating Apps for Men Who Have Sex with Men’ [2019] *Journal of Homosexuality*.

⁵² For instance, see Curtis (n 47).

⁵³ Ellen DB Riggle, Sharon S Rostosky and C Stuart Reedy, ‘Online Surveys for BGLT Research: Issues and Techniques.’ (2005) 49 *Journal of Homosexuality* 1, 8.

⁵⁴ Chris Dietz, ‘Governing Legal Embodiment: On the Limits of Self-Declaration’ (2018) 26 *Feminist Legal Studies* 185, 187.

In this project, a combination of application-based and social media recruitment was used. Application based recruitment is a common approach in research investigating apps,⁵⁵ although this does require careful planning and implementation, which I discuss below. Such techniques acknowledge and capitalise on the mobile and everyday nature of the internet by opening up research to a broad pool of potential participants. As Chiasson et al state, 'like all recruitment methods, there are many sources of potential bias in online sampling in addition to some technological issues specific to the Internet'.⁵⁶ However, when researching issues where internet access is already part of the eligibility criteria for the project, the advantages of researching via the internet are significant.

3.2.2 The Visual Nature of Applications

Visual methodologies were the second theme arising in the development of this project. The appearance of visuals in social research is not a recent development. Rose argues, however, that significantly more attention has been given to visual research, as part of a larger trend towards 'visual culture studies', in the last two decades.⁵⁷ Grady suggests that this trend is not a natural variation in changing academic interests but rather a response to the "pull" of mass visualisation in modern society.⁵⁸ Digital imagery and the rise of the graphical user interface on computers and mobile devices are clear examples of this mass visualisation. As

⁵⁵ See, for instance, Carl Anthony Bonner-Thompson, 'How to Do Grindr: Sensory, Visceral and Haptic Geographies of Men Who Use Grindr in Newcastle-upon-Tyne' (PhD Thesis, Newcastle University 2018).

⁵⁶ Mary Ann Chiasson and others, 'HIV Behavioral Research Online' (2006) 83 *Journal of Urban Health* 73, 77.

⁵⁷ Gillian Rose, 'On the Relation between "visual Research Methods" and Contemporary Visual Culture' (2014) 62 *Sociological Review* 24.

⁵⁸ John Grady, 'Reframing Visual Social Science: Towards a More Visual Sociology and Anthropology by Luc Pauwels' (2017) 32 *Visual Studies* 200.

noted in Chapter 1, the visual profile and the location-based capabilities of smartphones combine to connect otherwise strangers. In contrast to earlier forms of mobile connectivity, imagery and photography is not just media to be shared,⁵⁹ it is the medium through which communication takes place.

3.2.2.1 Pictures and Photos, Public and Private

When users first download an application, sometimes before even being asked to create an account, users are presented with what some applications have termed a “cascade” – a grid of nearby users’ profiles including a profile image where one has been provided.⁶⁰ The photos in these profiles play a significant role in establishing first impressions between users.⁶¹ In addition to publicly visible profiles, the private sharing of (often, sexually explicit) photos is common and can be a reason for application use in itself or a secondary aim where apps are being used to pass time,⁶² facilitate sexual encounters,⁶³ or search for and maintain romantic relationships.⁶⁴

⁵⁹ See, for instance, earlier literature on bluetooth connectivity: Sharif Mowlabocus, *Gaydar Culture: Gay Men Technology and Embodiment in the Digital Age* (Ashgate 2010) Ch 7.

⁶⁰ Jed R Brubaker, Mike Ananny and Kate Crawford, ‘Departing Glances: A Sociotechnical Account of “Leaving” Grindr’ (2016) 18 *New Media & Society* 373, 376; Yoel Roth, ‘Zero Feet Away: The Digital Geography of Gay Social Media’ (2016) 63 *Journal of Homosexuality* 437, 438.

⁶¹ Courtney Blackwell, Jeremy Birnholtz and Charles Abbott, ‘Seeing and Being Seen: Co-Situation and Impression Formation Using Grindr, a Location-Aware Gay Dating App’ (2015) 17 *New Media & Society* 1117.

⁶² Chad Van De Wiele and Stephanie Tom Tong, ‘Breaking Boundaries: The Uses & Gratifications of Grindr’ [2014] 2014 ACM International Joint Conference on Pervasive and Ubiquitous Computing 619.

⁶³ Kirsty Best and Sharon Delmege, ‘The Filtered Encounter: Online Dating and the Problem of Filtering through Excessive Information’ (2012) 22 *Social Semiotics* 237.

⁶⁴ Mark McCormack, ‘The Role of Smartphones and Technology in Sexual and Romantic Lives’ (Durham University 2015).

The sharing of sexually explicit photographs is itself a significant sociological issue,⁶⁵ which has potential socio-legal consequences in the context of harassment and so-called “revenge porn”.⁶⁶ Previous research into the legal implications of online imagery has employed online surveys as part of a mixed-methods approach, using written prompts rather than visuals to elicit participants’ responses.⁶⁷ Such an approach had limitations in this context, including in relation to one final visual element that should be highlighted: the emoji. As well as the Unicode standard set of emoji symbols and the variations of these developed by mobile phone manufacturers,⁶⁸ specific emoji symbols have been introduced by application developers and emoji use is a common occurrence on apps.⁶⁹ Both varieties of emoji contribute to a potential for ambiguity, in part because of the inherent ambiguity of symbolism.⁷⁰ But, also, because the specific appearance of emoji can differ between platforms, as well as between applications, which can significantly alter the meaning attributed to it.⁷¹

⁶⁵ Andrea Waling and Tinonee Pym, “C’Mon, No One Wants a Dick Pic”: Exploring the Cultural Framings of the “Dick Pic” in Contemporary Online Publics’ *Journal of Gender Studies* (2017) 1; Flora Oswald and others, ‘I’ll Show You Mine so You’ll Show Me Yours: Motivations and Personality Variables in Photographic Exhibitionism’ [2019] *The Journal of Sex Research*.

⁶⁶ Nicola Henry and Anastasia Powell, ‘Sexual Violence in the Digital Age: The Scope and Limits of Criminal Law’ (2016) 25 *Social and Legal Studies* 397; Thomas Crofts and Tyrone Kirchengast, ‘A Ladder Approach to Criminalising Revenge Pornography’ (2019) 83 *The Journal of Criminal Law* 87.

⁶⁷ Ari Ezra Waldman, ‘Law, Privacy, and Online Dating: Revenge Porn in Gay Online Communities’ (2019) 44 *Law and Social Inquiry* 987.

⁶⁸ See Unicode Inc, ‘Full Emoji List, V11.0’ (2018) <<https://unicode.org/emoji/charts/full-emoji-list.html>> accessed 28 September 2018.

⁶⁹ The Guardian, ‘Grindr’s Gaymoji: Pierced Aubergines, a Peach on a Plate – and a Banned “T”’ (*The Guardian*, 21 March 2017) <<https://www.theguardian.com/technology/shortcuts/2017/mar/21/gaymoji-pierced-aubergines-a-peach-on-a-plate-and-a-banned-t>> accessed 24 May 2018.

⁷⁰ It has been observed that emoji can serve several purposes in online communication. See, Lauren Gawne and Gretchen McCulloch, ‘Emoji as Digital Gestures’ (2019) 17 *Language@Internet*.

⁷¹ Fred Morstatter and others, ‘Cross-Platform Emoji Interpretation: Analysis, a Solution, and Applications’, *Proceedings of ACM Conferencw* (2017).

3.2.2.2 Visual Methods and Data

In order to investigate this visual side of application use and explore the relevance of the (visual) profile in criminal proceedings, a method that incorporated imagery into the data collection process seemed appropriate. Visual methods can incorporate a number of different approaches including the analysis of existing images by the researcher, getting participants to create new images, or exploring how existing images are “seen by particular spectators who look in particular ways”.⁷² Boellstorff et al note that multiple ethnographic researchers investigating digital phenomena have recorded and analysed visual data such as screenshots, shared images, and video capture, or included imagery in their data collection process.⁷³ These different approaches do share a commonality, however; all consider the intention behind the production of an image, the audience who view it, and the interpretation it is given.⁷⁴

Some researchers have, in prior studies, taken data directly from applications.⁷⁵ In order to avoid ethical concerns, these authors have taken data only from what might be categorised as “public” spaces on apps and have redacted images where necessary.⁷⁶ Others investigating the visual nature of application use have circumvented such concerns by relying on stock images,⁷⁷ or have sought to only

⁷² Gillian Rose, *Visual Methodologies: An Introduction to the Interpretation of Visual Materials* (Sage 2001) 12.

⁷³ See Boellstorff and others (n 26); see, also, Hallett and Barber (n 30).

⁷⁴ Rose (n 72) 23–25.

⁷⁵ See, for instance, Elija Cassidy, ‘Gay Men, Social Media and Self Presentation: Managing Identities in Gaydar, Facebook and Beyond’ (PhD Thesis, Queensland University of Technology 2013); Emeka E Moses, ‘Eggplants and Peaches: Understanding Emoji Usage on Grindr’ (MA Thesis, East Tennessee State University 2018).

⁷⁶ See, in particular, Cassidy (n 75); Guido Noto La Diega, ‘Grinding Privacy in the Internet of Bodies’ in Ronald Leenes and others (eds), *Data Protection and Privacy* (Hart Publishing 2019).

⁷⁷ Roth, ‘Zero Feet Away: The Digital Geography of Gay Social Media’ (n 60).

capture participants' profiles whilst still anonymising non-relevant information.⁷⁸ Whilst there remain few technical limitations to capturing images from dating applications, there are arguably ethical concerns with doing so, even where this data is lifted from public profiles where there is a limited expectation of privacy. There is a risk of exposing private information without consent, even where care is taken to anonymise data, or the converse risk that anonymisation distorts the meaning of the data collected. Digital walkthrough methods, advocated by Albury and colleagues,⁷⁹ are one method which facilitates this approach – only capturing the data of participants or the public profiles they see when using apps. However, where the research topic is particularly sensitive, as in the case here with HIV disclosure, such approaches arguably do not go far enough.

When developing this project, I considered two potential means of addressing this challenge. On the one hand, I could fully redact any images collected during the data collection process or allow participants to discuss the images they saw but not reproduce these images in this thesis. On the other hand, I could produce mock images to elicit participants' responses which I would then be able to reproduce in this text. When evaluating these options, two factors led to the choice of the latter approach. Firstly, researcher created images, or “visual vignettes” allow the researcher to focus on specific issues which might occur infrequently during digital walkthroughs. Secondly, this approach communicated a greater respect for the privacy of application spaces to potential participants.

⁷⁸ Freddy MacKee, 'Social Media in Gay London: Tinder as an Alternative to Hook-Up Apps' (2016) 2 *Social Media and Society*.

⁷⁹ Albury and others (n 37) 9.

Again, given the sensitivity of the topic, reassuring participants in this manner seemed desirable.

3.2.2.3 *Visual Elicitation*

Visual elicitation, using images to facilitate discussion and stimulate additional responses from participants in the manner done here, is a common approach in a range of social research projects.⁸⁰ The visuals used in visual elicitation can be photographic or non-photographic; they can be presented to participants, or participants can be invited to produce the images themselves before then returning to them at a later stage of the research.⁸¹ The latter introduces a collaborative element into the research, with the researcher providing direction but the participant ultimately possessing greater control over the direction of discussion.⁸² However, it also acts as a barrier to participation by requiring ongoing or repeated contact between the researcher and participant. The former is less collaborative in nature, with the researcher creating images that address the specific issues the researcher identifies as important but allows a more expedient participation process.

The categorisation of photo elicitation, particularly photo elicitation involving researcher created images, as a form of visual methodology has been challenged. Using images in interviews – or in this case, surveys – is, according

⁸⁰ See Emma Hutchinson, 'Digital Methods and Perpetual Reinvention? Asynchronous Interviewing and Photo Elicitation' in Helene Snee and others (eds), *Digital Methods for Social Science* (Palgrave Macmillan 2016).

⁸¹ See, for instance, Rosaleen Croghan and others, 'Young People's Constructions of Self: Notes on the Use and Analysis of the Photo-Elicitation Methods' (2008) 11 *International Journal of Social Research Methodology* 345.

⁸² Salmons (n 23) 95.

to Grady, a visual technique but not a form of visual sociology.⁸³ He argues this is, in part, because this uses images to investigate another phenomenon, rather than the visibility of society itself.⁸⁴ Whilst such claims may have merit where visual elicitation is used purely as a trigger for discussion of another topic, here where visual elicitation is used to elicit discussion on how images themselves are seen and interpreted, such claims are more doubtful.

3.2.3 Context and the Importance of Scenarios

As mentioned in the introduction to this chapter, the vignette technique used here had several advantages given that the data collection in this project aimed to capture participants' beliefs and attitudes in a predetermined context. Vignettes, stories developed with the research question or questions in mind, have been used in a variety of research projects, including those related to HIV.⁸⁵ They have been applied in a variety of research areas due to their perceived effectiveness at reducing participants' hesitation at discussing potentially embarrassing or controversial opinions.⁸⁶ They are also an example of a method in keeping with the third methodological theme in this project: contextual or scenario-attentive research.

Given that I argue that the law can and should be informed by contextual knowledge and understanding, but keeping in mind the ethical limitations

⁸³ John Grady, 'The Scope of Visual Sociology' (1996) 11 *Visual Sociology* 10.

⁸⁴ Grady (n 83) 12.

⁸⁵ See, for example, Rhidian Hughes, 'Considering the Vignette Technique and Its Application to a Study of Drug Injecting and HIV Risk and Safer Behaviour' (1998) 20 *Sociology of Health and Illness* 381.

⁸⁶ Alan Bryman, *Social Research Methods* (5th edn, Oxford University Press 2016) 259–260.

discussed in the previous section, the use of vignettes was an appropriate means of capturing rich informative responses from participants in this project. This third methodological theme was also closely interrelated with the second, in that the vignettes used were predominantly visual. Consequently, as well as drawing on methods literature relating to vignettes, generally, I also took inspiration from *thematic apperception tests*, or “TAT(s)”, a projective technique used in psychology which uses visuals to elicit responses in the form of stories or narratives.⁸⁷ By incorporating images to elicit responses from participants, I attempted to capitalise on the added realism that imagery can provide in the context of applications when developing the vignettes.

The stories and images used in TATs are typically free of text and simplistic in nature.⁸⁸ As psychological tools, the analysis of TAT responses may be qualitative or mixed methods, but in either event there is a focus on achieving a “close examination of qualitative features” of responses.⁸⁹ Other methods, such as Braun and Clarke’s story completion approach, which use written stems for participants to expand upon,⁹⁰ provide a greater level of detail whilst remaining ‘ambiguous enough for participants to “fill in” the remaining gaps.’⁹¹ The approach taken here might be considered a middle ground between these two approaches, in that the stimuli materials are comparatively detailed compared to TATs, but provide less narrative direction when compared to story completion tasks.

⁸⁷ Sharon Rae Jenkins, ‘Not Your Same Old Story: New Rules for Thematic Apperceptive Techniques (TATs)’ (2017) 99 *Journal of Personality Assessment* 238.

⁸⁸ Phebe Cramer, ‘Using the TAT to Assess the Relation Between Gender Identity and the Use of Defense Mechanisms’ (2017) 99 *Journal of Personality Assessment* 265.

⁸⁹ Jenkins (n 87) 248.

⁹⁰ Braun and Clarke, *Successful Qualitative Research* (n 7) 142–145.

⁹¹ Braun and Clarke, *Successful Qualitative Research* (n 7) 145.

This level of detail was achieved through the creation of five “visual vignettes”, with two of these accompanied by a short, written prompt. Visual vignettes are an arguably underexplored variation on vignettes and story completion tasks.⁹² As with written vignettes, these prompts allow participants to symbolically distance themselves from their responses, giving an additional degree of anonymity by limiting the extent to which participants are obliged to disclose their own behaviour.⁹³ Whilst remaining focused on the context for participants’ perceptions rather than their disclosure and trust practices, in contrast to written vignettes and some story completion tasks, these visual vignettes could be approached either as 3rd person tasks (i.e. participants projecting onto the characters) or 1st person tasks (i.e. participants placing themselves into the story).

This made the creation of the stimuli a particularly important stage of planning this project. Where vignettes are used qualitatively, Braun and Clarke state that ‘[a]uthenticity is important with regard to how much a vignette engages a participant in the topic and task, and so produces rich data through which to explore these.’⁹⁴ This is in contrast to quantitative projects, where ‘the gap between vignettes and ‘reality’ is of great concern’.⁹⁵ Discussing story completion tasks specifically, Smith suggests that:

Irrespective of what we call story completion “data,” if people’s repertoire of personally and socio-cultural-available narratives do influence how they respond to a stem, this brings into focus story completion as a useful method for “capturing” socially and culturally prevalent sense-making and moral forces.⁹⁶

⁹² See Harper (n 11); Groot and others (n 11).

⁹³ Barter and Renold (n 12).

⁹⁴ Virginia Braun and Victoria Clarke, ‘An Introduction to the Vignette Method’ (*Successful Qualitative Research Companion Website*, 2013) <<https://studysites.uk.sagepub.com/braunandclarke/study/additional.htm>> accessed 1 July 2020.

⁹⁵ Braun and Clarke (n 94).

⁹⁶ Brett Smith, ‘Some Modest Thoughts on Story Completion Methods in Qualitative Research’ (2019) 16 *Qualitative Research in Psychology* 156, 158.

Again, the authenticity of the stimuli material seemed critical in order to draw on these personal and socio-cultural narratives. Therefore, creating the stimuli entailed a detailed reflection on existing literature addressing application use and app design, as well as on the socio-legal debates surrounding disclosure, non-disclosure and deception discussed in Chapter 2. One criterion by which authenticity in this project came to be evaluated was participants' engagement with the stimuli and lack of negative feedback about their (un)authenticity. Whilst one participant noted that a character in a scenario was an 'imaginary person',⁹⁷ several other participants discussed the mock profiles as if they were taken from real applications, with comments such as 'I don't use this app' when discussing the specifics of the stimuli profiles.⁹⁸ Another criterion was the general engagement with the survey and other feedback, which was on the whole positive as to the aims of the research and the data collection survey. Whilst responses were somewhat short, this is not uncommon with qualitative data collection of this kind,⁹⁹ and this approach gave participants the space to expand and elaborate where desired.¹⁰⁰

3.3 Method and Ethics

These methodological themes, and the approaches to data collection associated with them, influenced the development of the data collection survey in this project, which I now consider. Using online recruitment and data collection as I have done

⁹⁷ Participant 401353-401344-40159893.

⁹⁸ Participant 401353-401344-42628221.

⁹⁹ Gareth Terry and Virginia Braun, 'Short but Often Sweet' in Virginia Braun, Victoria Clarke and Debra Grey (eds), *Collecting qualitative data: a practical guide to textual, media and virtual techniques* (Cambridge University Press 2016).

¹⁰⁰ For some discussion of the challenges that accompany collecting data about complex online behaviour, see Ragan Fox, *Gays in (Cyber-) Space: Online Performances of Gay Identity* (VDM Verlag Dr Müller 2007) 161.

here has several advantages, particularly in technology focused research such as this, but also presents some limitations which I highlight below. In this section, I also address the ethical considerations which went into the design of the study and the eligibility criteria and recruitment process used to find participants for the project.

3.3.1 Online Surveys

The number of online survey sites has proliferated in recent years and consequently the social science researcher now has a range of suitable options when considering which survey platform to employ.¹⁰¹ Developments in technology also mean that, in contrast to earlier online survey options,¹⁰² constructing an online survey is no longer difficult and does not require technical knowhow. Whilst researchers experienced in online web-development may find it easier to construct novel and technically intricate surveys, the design tools available on most survey platforms should suffice for most projects, including those incorporating visuals, as was the case here.

Nevertheless, the choice of survey platform is also a significant step in the development of online projects. There are a number of implications in terms of cost, with some platforms locking certain tools behind paywalls or requiring a subscription, as well as in terms of appearance, means of distribution and eventual options in terms of analysing or exporting data. In this project,

¹⁰¹ The range of available sites is too extensive to list here, but options include SurveyMonkey, Qualtrics, and Prolific among many others.

¹⁰² Riggle, Rostosky and Reedy (n 53); Harding and Peel (n 48).

OnlineSurveys.ac.uk (formerly Bristol Online) was used.¹⁰³ As Northumbria University had a licence for this site, which I was able to make use of, there were no costs for developing the survey using OnlineSurveys. The site is also hosted on an academic (ac.uk) web address and the URL for a survey begins with the name of the licensee university. On multiple occasions throughout the project, the Northumbria prefix and ac.uk suffix reassured prospective participants recruited through applications that the project was genuinely academic. It is possible that this was also the case with social media recruitment, although no direct feedback was gathered which supports or disputes this suggestion.

One final consideration which should be made when choosing online survey platforms is reliability and data security. Given that one of the advantages of asynchronous online data collection is that participants can take part at a time suited to them, it is important that survey platforms do not suffer significant downtime during the data collection phase. With the exception of a short pre-planned period of maintenance in mid-November 2018, OnlineSurveys did not experience any outages throughout the data collection period.¹⁰⁴ OnlineSurveys is operated by JISC, a Higher Education non-profit organisation, and has a reputation for data security and keeping up to date backups. Surveys using the site take place over a secure connection, offering additional reassurance to participants that their responses are secure.

¹⁰³ For ease of reference, this is referred to as OnlineSurveys (without a space) below. General references to surveys carried out online, irrespective of the site they are carried out on, include a space and avoid capitalisation.

¹⁰⁴ During this period, of a few hours, those using the survey URL were invited to come back later. No participants or prospective participants recruited through application based recruitment seemed to be impacted by this downtime.

3.3.1.1 Designing the Survey

The design of the data collection survey aimed to use visual elicitation to collect data on the contextual knowledge and understanding related to HIV disclosure and non-disclosure and the disclosure features now found on many dating applications. Online surveys, in contrast to online interviews and other qualitative online methods, arguably share some similarities with standardised interviews – in that they require researchers to have ‘fairly solid ideas about the things they want to uncover’.¹⁰⁵ Unlike these other methods, survey participants are each presented with the same series of stimuli and questions, meaning that the eventual design of the survey establishes some of the limitations of the overall project.

In this project, the survey was divided into four stages. First, after providing participant information and obtaining consent, a series of eligibility questions checked that participants were within the recruitment criteria set out below. Following this, participants were then presented with the first three vignettes, composed of a mock profile without additional text. Participants were then presented with the final two vignettes, which consisted of similar mock profiles accompanied by a short, written prompt. I provide a detailed account of each stimuli and the questions associated with it, below.¹⁰⁶ The final section of the survey collected additional background information from participants, in particular asking about their prior awareness of *treatment as prevention*, which had been discussed in one of the two later vignettes.

¹⁰⁵ Bruce Lawrence Berg and Howard Lune, *Qualitative Research Methods for the Social Sciences* (8th edn, Pearson Education 2014) 109.

¹⁰⁶ See Section 3.4, below.

Charoenruk and Sage emphasise the importance of quickly establishing the importance of images when they are used in web surveys. Where images are seen as less central to the survey as a whole, and to each question individually, they suggest participants are less likely to fixate on the images to the extent needed for the image to be impactful on responses.¹⁰⁷ The decision to place the image only vignettes before the vignettes with written text was done with this observation in mind. Similarly, the webpages of the survey were formatted in such a way that the image was at the top left of the page, or likely to fill the screen with questions listed below if viewed on a mobile device. For similar reasons, the instructions given to participants at the beginning of the survey drew particular attention to the images. This was also done in order to emphasise that the images were mocks, not screenshots of actual application users, which was necessary both to avoid confusion and to reassure participants that the research was not exposing other individuals' application use.

3.3.1.2 Ensuring Mobile Compatibility

As the planned recruitment methods involved social media and application-based recruitment, it was anticipated that a significant proportion of participants would access the survey via a mobile device. Ensuring that the survey was compatible with such devices was therefore a critical part of the design process, reflecting a broader concern with the accessibility of online participation methods in social science research.¹⁰⁸ In order to ensure compatibility, some research into smartphone use has employed specifically designed applications which

¹⁰⁷ Nuttirudee Charoenruk and Mathew Stange, 'Respondent Processing of Images in Web Surveys' [2018] *Sociological Methods & Research*.

¹⁰⁸ Evans, Elford and Wiggins (n 22).

participants download,¹⁰⁹ however these introduce additional privacy concerns and require a greater level of technical skill to develop. Web-based surveys avoid these concerns and can be accessed across all smartphone operating systems. However, it is also important to consider how the survey will appear across the various devices that may access it, including on desktop and laptop computers.

The choice of survey platform has a significant influence on this appearance. OnlineSurveys is able to detect whether the device accessing the survey is a mobile or desktop and automatically direct users to a mobile optimised version of the survey if necessary. When designing the survey, the desktop and mobile version of each page was inspected on several devices to ensure that participants' experiences would not be dissimilar based on how they accessed the survey. One limitation of OnlineSurveys related to the size of the image used in the survey. Image size had to be kept consistent between the mobile and desktop versions of the survey, with the result that the largest image needed to be viewable on the smallest mobile devices. Some participants, particularly those on desktop, found that this made the image harder to view. However, this had to be balanced with the risk that making the image any larger would mean it surpassed the size of the screen on smaller devices. Based on feedback in early responses, an option to open the image in a new window, where it could be significantly larger, was added.

More generally, the size of the images was also a concern, in that larger image files take longer to download and, if participants are accessing the survey using

¹⁰⁹ Borja García, Jo Welford and Brett Smith, 'Using a Smartphone App in Qualitative Research: The Good, the Bad and the Ugly' (2016) 16 *Qualitative Research* 508.

mobile data, this may use up more of a participant's data allowance.¹¹⁰ Critiques of online recruitment have highlighted that requiring internet access may deter participation by those in lower socio-economic groups who have limited internet access.¹¹¹ I would argue that more affordable internet access means that, when focusing on an online phenomenon such as mobile dating use, these effects are limited. However, the possibility that some prospective participants were deterred because the survey would use up limited mobile data allowances is perhaps a valid concern, one that I attempted to mitigate by ensuring that the survey did not require participants to download large files, and one which the corresponding benefits in terms of ease of recruitment and participation was felt to outweigh.

Accessibility for disabled participants is also a specific concern when carrying out web surveys and other online research.¹¹² Again, OnlineSurveys offered some advantages when compared to other online survey platforms, as it uses relatively large buttons for navigation through the survey, which limits the need for precise mouse control. Where possible, steps were taken during the design of this survey to minimise potential difficulties caused by the layout of the survey. For instance, pages were generally designed to be no greater than twice the length of any of the images, meaning that participants on mobile devices were less likely to struggle with repetitive scrolling in order to navigate. Unfortunately, despite these steps, at least one participant found the survey somewhat difficult to complete because of a physical disability and the size of the stimuli image when viewed on

¹¹⁰ In 2005, when internet access, generally, was more expensive, a comparable concern was noted in relation to online surveys more broadly. See Riggle, Rostosky and Reedy (n 53) 5.

¹¹¹ Roger Sapsford, 'Research and Information on the Net' in Roger Sapsford and Victor Jupp (eds), *Data Collection and Analysis* (2nd edn, SAGE Publications in association with the Open University 2006).

¹¹² Harding and Peel (n 48).

his mobile device.¹¹³ It is possible other participants had similar issues, although it is hoped that by enabling the survey to be completed on mobile devices these difficulties were overcome in some cases by participants' devices, which can often be augmented to offer additional accessibility functionality.

3.3.2 Eligibility and Recruitment

3.3.2.1 Eligibility

As has been noted, application usage is frequently precarious¹¹⁴ and many users might be considered hard to reach.¹¹⁵ As well as the motivations for application use being varied and multifaceted,¹¹⁶ users may leave and return to applications frequently or leave on a permanent or semi-permanent basis as these motivations change.¹¹⁷ This can present challenges when establishing eligibility criteria for projects, such as this, where the primary eligibility criteria is application use. In addressing this challenge, the survey asked participants to confirm that they:

- a) Were aged 18 or over;
- b) Had previously used a dating application targeted at men who have sex with men;
- c) Had used an application of this type at least once in the past three years, and;
- d) Had used this application in England and Wales.

¹¹³ This participant was recruited via Grindr and provided some informal feedback through messages on Grindr following completion of the survey.

¹¹⁴ Brubaker, Ananny and Crawford (n 60).

¹¹⁵ Danielle Couch and Pranee Liamputtong, 'Online Dating and Mating: The Use of the Internet to Meet Sexual Partners' (2008) 18 *Qualitative Health Research* 268.

¹¹⁶ Kathryn Macapagal and others, 'Geosocial Networking App Use Among Men Who Have Sex With Men in Serious Romantic Relationships' (2016) 45 *Archives of Sexual Behavior* 1513.

¹¹⁷ Brubaker, Ananny and Crawford (n 60).

Research ethics motivated the introduction of the age limit, which excluded any potential participants aged below 18. Applications typically impose the requirement that users are over the age of 18, although anecdotally it seems this restriction is not always adhered to, and to avoid the need for additional consent requirements, a minimum age limit seemed appropriate. There was, however, no rationale for imposing an upper age limit on participation.

The limitations on relatively recent application use were included so that participants would have a general awareness of the application marketplace over the time period when HIV disclosure features were introduced. This does not necessarily mean that they will have first-hand experience of these features but reduced the need for these features to be explained. Similarly, the geographical limitation was included because the project overall looks at application use in the context of HIV transmission law as it exists in England and Wales. As the context surrounding application use differs in an international context, where additional laws may restrict or punish sexual relationships between men, and these issues are deserving of particular attention, it seemed appropriate to limit participants to those who had used apps within the jurisdiction of England and Wales.

A particular consideration when developing these eligibility criteria was the desire not to exclude potential participants who do not identify as LGBT or who are reluctant to categorise themselves within certain groups.¹¹⁸ Consequently, these filtering questions did not ask participants to self-identify with a particular

¹¹⁸ This might be compared to authors who use the term 'nonheterosexual' in their work in an attempt not to exclude alternate identities. See Stefano Ramello, 'Behind the Mask: A Typology of Men Cruising for Same-Sex Acts' (2013) 13 *Identity* 73, 73–74.

sexuality, only confirm that they had used applications targeted at men who have sex with men. Similarly, given that participants' narrative of their own application could be complex and nuanced,¹¹⁹ when participants were asked to describe how long they had been using applications for in the final section of the survey, this was done with an open text field, rather than through closed questions.

When designing the survey, thought was given to the most effective way to distribute it given these eligibility criteria. As Grey notes, when recruiting from among hard to reach groups and when investigating sensitive topics, there is prudence in advertising the research and inviting those who are interested to contact the researcher, rather than individually contacting potential participants.¹²⁰ This limits the ability of the researcher to conduct purposeful sampling. It suggests that the researcher can only exclude potential participants through filtering, as a form of criterion sampling,¹²¹ rather than actively seeking out participants who meet previously established categories suitable for study.¹²² However, by promoting the research in specific spaces, such as on applications, it is possible to target specific populations without directly approaching individuals, arguably an indirect method of purposive sampling. To an extent, this is also a form of convenience sampling, which has typically been seen in research conducted into serostatus issues¹²³ and application use.¹²⁴ Given that the

¹¹⁹ Take, for example, the participant in Brubaker who equated 'leaving Grindr' with 'not meeting people off of Grindr', Brubaker, Ananny and Crawford (n 60) 381.

¹²⁰ David E Gray, *Doing Research in the Real World* (Sage 2014) 221.

¹²¹ Gray (n 120) 221.

¹²² Bryman (n 86) 412–413.

¹²³ Patrick J Murphy and others, 'Serostatus Disclosure, Stigma Resistance, and Identity Management among HIV-Positive Gay Men in Ireland' (2016) 26 *Qualitative Health Research* 1459.

¹²⁴ Karoline Gatter and Kathleen Hodkinson, 'On the Differences between Tinder versus Online Dating Agencies: Questioning a Myth. An Exploratory Study' (2016) 3 *Cogent Psychology*.

eligibility criteria also included recent, but not current, application users; there was also a need to advertise the project using other means as well, this was achieved through a combination of social media recruitment and possible snowball recruitment by some participants.

3.3.2.2 Application Based Recruitment

Recruitment through mobile applications is a common technique and can be achieved through one of two means. On the one hand, recruitment can take place using paid-for advertisements on these applications.¹²⁵ On the other hand, recruitment can be undertaken using a user profile on the application itself.¹²⁶ Whilst the former has certain time-saving advantages, given that the creation and management of a single profile does not carry a significant financial or time-cost, the latter option was chosen here. It should also be noted that I had previously used several applications myself and although I could be seen as having “left” these applications, as I no longer have them downloaded on my personal devices and do not regularly make use of them,¹²⁷ I might also be seen as a partial insider given my existing experiences. This enabled me to create a profile on two applications – Grindr and Hornet – and to navigate the use of these sites whilst recruitment took place. These applications were selected as both had specific

¹²⁵ William Goedel, Forrest Brooks and Dustin Duncan, ‘Approaches to Sampling Gay, Bisexual, and Other Men Who Have Sex with Men from Geosocial-Networking Smartphone Applications: A Methodological Note’ (2016) 5 *Social Sciences* 51.

¹²⁶ For examples of this in doctrinal work, see Max Morris, ‘Incidental Sex Work: Casual and Commercial Encounters in Queer Digital Spaces’ (PhD Thesis, Durham University 2018); Alexander Maine, ‘Same-Sex Marriage and the Sexual Hierarchy: Constructing the Homonormative and Homoradical Legal Identities’ (PhD Thesis, Northumbria University 2019).

¹²⁷ See Brubaker, Ananny and Crawford (n 60). During the data collection period, I did reinstall the two applications used for recruitment onto my personal devices. This enabled me to validate how the “researcher” profile was seen by others nearby, so my ‘leaving’ of these apps might itself be seen as precarious.

HIV disclosure features and position themselves as “broad churches”, rather than targeting a niche market.¹²⁸

Other researchers making use of these applications for recruitment purposes have spoken of the challenges that accompanied being an insider in these spaces, particularly regarding boundaries between the research usage of apps and the expectation of other users that applications are used for social-sexual means.¹²⁹ As well as this, I was particularly concerned that the profile not be seen to waste anyone’s time or spam other users. In earlier online research there was concern over “spamming” email distribution lists and the disservice this did to future researchers who might be refused access by gatekeepers or be disregarded as spam themselves.¹³⁰ In the present context, this arguably extends to not being forthright about the reason why one is on the application in the first place. Packer suggests that although establishing rapport can be an important step in recruitment for qualitative projects, there is a relationship of power which must not be misused which makes wasting participants’ time a legitimate ethical concern.¹³¹ Consequently, I felt that it was necessary to make it as clear as possible, as early as possible, that the account was being used only for research purposes.

For these reasons, the research profile used might be considered impersonal but practical. The username for the profile was “Researcher” and the bio explained

¹²⁸ Alexis Mastroiannis, ‘Gay Dating Apps: A Comprehensive Guide to Jack’d, Grindr, Hornet, Scruff and the Rest’ (*Pink News*, 5 March 2018) <www.pinknews.co.uk/2018/03/05/best-gay-dating-apps-jackd-grindr-hornet-scruff/> accessed 26 August 2019.

¹²⁹ Bonner-Thompson (n 39), 5-6; Morris (n 126) 102–105.

¹³⁰ Riggle, Rostosky and Reedy (n 53) 8.

¹³¹ Martin Packer, *The Science of Qualitative Research* (Cambridge University Press 2018) 61.

that the profile was being used to recruit participants for a project investigating application use. It invited users to send a message if they were interested in learning more about the project and at this stage, I answered any questions potential participants might have and provided a link to the survey site if there was interest in taking part. As age is shown by default on both applications, my age was included in the profiles, but no additional personal information was provided. A photograph was not included in either profile. However, because Hornet requires a picture of some nature in order to be shown to nearby users, a blank background was uploaded on that app.

Recruitment on both applications was conducted by keeping the app open for extended periods. As both apps are based on seeing the profiles of other users who are nearby and online, a general picture can be created of where the researcher profiles will have been visible. Given travel patterns over the time recruitment took place, the profiles are more likely to have been seen by those in Yorkshire and the North East, as well as occasionally in London, Cambridge and the Midlands. Participants recruited through apps were more likely to be using these applications in urban areas, as well as in areas where the East Coast Main Line ran nearby. During these periods, messages were received both from users who had clearly read the profile and those who clearly had not, the majority did appear to have engaged with the research focus described in the profile's username and bio, expressing curiosity or willingness to participating in the project.

Nevertheless, many of these applications maintain a reputation for being exclusively aimed at promoting casual sexual encounters and as Morris has

noted: 'no one uses Grindr to participate in research'.¹³² It is perhaps unsurprising, therefore, that a minority of messages were received which were sexually explicit. Nevertheless, the number of sexually explicit messages that were received was relatively low and reassured me of the benefits of establishing a distinct researcher profile. Where these messages were received, I addressed each on a case by case basis, responding where I felt it courteous to explain that I was not on the application for that purpose. In some instances, where an explicit photo was sent without any accompanying message, this was not done, and I instead waited until a subsequent message was sent before responding. This approach was relatively effective, and most users typically responded stating that they had not engaged with the information in the profile before sending the message but had now taken note of it. Importantly, few expressed frustration or dissatisfaction with my use of the app for research purposes.

However, towards the end of the data collection process, the recruitment profile used on Grindr was banned by the platform's moderators. Through emails with Grindr's support team, I learned that this was due to a report by another user, but I was unable to ascertain the specific complaint made and no interaction with another user stood out to me as the likely source of this complaint. As with analogue research methods, digital research requires careful consideration of the level of privacy expected in particular spaces.¹³³ The approach taken here relied upon not imposing upon other users and instead responding to interest, so that the account was not perceived as an intrusion and did not impede future

¹³² Morris (n 126) 104.

¹³³ Chiasson and others (n 56) 79–81.

researchers.¹³⁴ Given that only one complaint appears to have been received across the seven months when recruitment took place, this approach was moderately effective, but further methodological research is necessary to better understand how to carry out web-based research in a fully unobtrusive manner, if this is possible whilst still maintaining the fully informed consent and respect for privacy which was achieved here.

3.3.2.3 Social Media Recruitment

Recruitment through social media is a commonly used approach, presenting some similar ethical challenges to offline (and application-based) recruitment, in terms of privacy, transparency, and the need for informed consent.¹³⁵ Given the privacy concerns associated with many social networking sites, Curtis emphasises that recruitment through social media should still direct participants to secure web addresses for data collection itself.¹³⁶ In this project, participants recruited through social media were directed to the same OnlineSurveys webpage as application-recruited participants. The social media sites used were Facebook and Twitter, both of which allow posts to be shared by others, also facilitating a degree of snowball sampling.¹³⁷

¹³⁴ Generally, the discussion accompanying Riggle, Rostosky and Reedy (n 53).

¹³⁵ Luke Gelinas and others, 'Using Social Media as a Research Recruitment Tool: Ethical Issues and Recommendations' (2017) 17 *American Journal of Bioethics* 3. How these concerns were addressed in this project is discussed below.

¹³⁶ Curtis (n 47).

¹³⁷ Word of mouth, as well as retweeting and the sharing of Facebook posts, may also have advertised the project to a wider range of potential participants. Of those recruited on social media, several participants also stated that they had shared the project with others. On snowball sampling, see Bryman (n 86) 415; Gray (n 120) 226.

The recruitment posts used gave a limited description of the role of the study, prioritising the role of dating applications. This was done as social media posts are inevitably seen by many who do not use dating applications and whilst these individuals would be prevented from participating via the filtering questions, avoiding this at an early stage seemed appropriate. Further information on the focus of the project, including its interest in HIV and HIV disclosure, were provided to participants before the beginning of the survey on the OnlineSurveys site. These posts were made on my own Twitter¹³⁸ and Facebook accounts. On Facebook, posts were made both on my homepage and on group pages for LGBT networks I was a part of. Most of these posts made use of an image (Image 1.) and included an email address so that prospective participants recruited through social media were afforded the same ability to ask questions prior to participation as application-recruited participants.

Image 1: Recruitment Image

**INTERESTED IN TAKING PART IN A
STUDY ABOUT DATING
APPLICATIONS?**

If you use dating apps aimed at Gay and
Bisexual Men we'd like to hear from you.

Complete a short survey at
northumbria.onlinesurveys.ac.uk/dating-apps
Or contact
c.a.r.giles@Northumbria.ac.uk
for more information.




¹³⁸ This can be found at twitter.com/giles_cameron.

3.3.3 Research Ethics

One significant ethical concern considered during the development of the project related to privacy. Earlier in that year there had been privacy concerns related to Grindr, particularly relating to the HIV disclosure feature, when it had been revealed that the developers had been sharing users' HIV status with third parties.¹³⁹ Therefore, as well as the general need to maintain participants' privacy, there was an additional need to reassure participants given the nature of this project. To achieve this, privacy and data protection information and general participant information were listed on two separate webpages at the beginning of the survey, both of which asked participants to confirm that they understood the information provided. Data protection steps taken included the selection of OnlineSurveys, which uses secure servers to store responses, and creating regular backups of the data which were password protected and stored securely in a locker in the Faculty of Business and Law Postgraduate Research office.

Another ethical concern was ensuring that all participants were over the age of 18. As noted above, there is typically a minimum age requirement on applications, but anecdotal evidence suggests that some users are below these age limits. As part of the filtering questions at the beginning of the survey, participants were required to provide an age range, which then directed those under 18 to a rejection page. However, there remains a possibility that, as with applications, a participant might list an age over 18 in order to take part. Any steps to address this issue through verification of ID or other means would have undermined the

¹³⁹ Julia Belluz, 'Grindr Is Revealing Its Users' HIV Status to Third-Party Companies' (*Vox*, 3 April 2018) <<https://www.vox.com/2018/4/2/17189078/grindr-hiv-status-data-sharing-privacy>> accessed 26 August 2019.

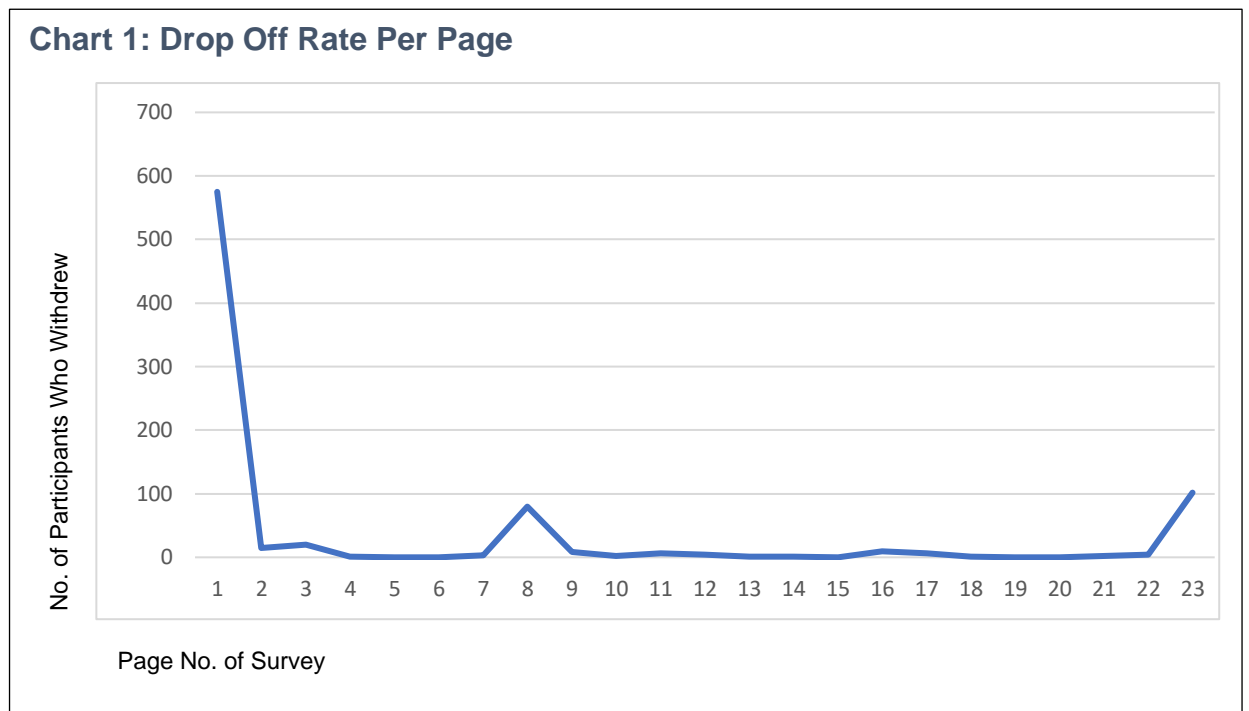
sense of anonymity afforded to participants, even if details were kept anonymously or destroyed once verified. Given that there was no financial incentive for participating, I would suggest it is unlikely that any participants did falsify this information, given that the rejection page explained that there were eligibility criteria in place.

3.3.3.1 Consent and Withdrawal

In addition to questions verifying age and prior application use in England and Wales, consent was recorded through a series of questions at the beginning of the survey. These were placed after the online “information sheet” which was available to download as a PDF (Appendix 1). Among this information, participants were informed that they could withdraw at any point during the survey by closing the browser before completion. Where participants did this, none of the data provided was retained and the only information recorded was the page the participant was on when they closed the browser. OnlineSurveys does have a feature which allows participants to close the survey and return to it at a later stage. However, this feature was disabled for this survey, as it required additional cookies being recorded on a participant’s device. Although this may have resulted in some participants dropping out where unable to complete the survey in one sitting, this seemed preferable to requiring those participants who wished to withdraw to complete an extra step in order to withdraw.

In Chart 1, below, the number of participants who left the survey on each page is shown. For example, 575 people used the link provided to the project, but then closed the survey without proceeding further. In some instances, this dropout rate

might be explained by participants reading the participant information and then returning to the survey at a later time. Other than a rather large dropout on this first page, the most significant dropout was on page eight, where the first of the vignettes was presented to participants.



It is somewhat disappointing that these prospective participants found the nature or format of the questions unappealing and declined to participate once they saw the vignettes. However, the absence of a similar steep decline later in the survey supports the decision to establish the format of the question as early as possible within the survey as, had other questions come before the vignettes, there may have been a similar dropout but after participants had expended time and effort on completing parts of the survey. Although other approaches may have resulted in a different rate of attrition across the survey, it is questionable whether a different approach would have produced a different overall dropout rate. Given the benefits of the vignette approach in ethical and analytical terms, the approach

taken enabled a risk dataset to be collected in a manner which, the data suggests, was engaging and stimulating for participants.

Withdrawal after completion of the survey was possible via a randomly generated participant ID provided to participants upon completion of the survey. For participants' ease, the ID and debrief information could be downloaded and saved as a PDF, along with a copy of the participant's response. Participants were informed that if they withdrew within one month, their responses could be removed entirely, and that after this period every effort would be made to limit the use of their response, but analysis may have taken place that might prevent full redaction. Ultimately, no participants withdrew post-submission. It is hoped this is because no participant came to regret taking part in the project. However, it should also be acknowledged that withdrawal required participants to note down their participant ID, which may have deterred those who had not saved the debrief information; although that no participant requested withdrawal without this is, in itself, reassuring.

3.4 Stimuli Image Creation

The purpose of the visual stimuli in this project was to elicit discussion about HIV disclosure, non-disclosure and application use, more broadly, in order to evaluate the relevance of application evidence in criminal proceedings and as a potential influence on the law addressing HIV transmission. As discussed above, the visual and narrative vignettes used here were distinct from visual elicitation methods used elsewhere. In contrast to other visual elicitation research, which typically

uses simple illustrations,¹⁴⁰ the images used here were detail rich and incorporated several features, including written text. I created each image in photoshop, using stock photographs within the vignette where necessary. Ultimately, five vignettes were produced. Each vignette was designed to look like a generic application and incorporated multiple points of potential ambiguity in an attempt to elicit relevant discussion by participants. One of the main focuses of each of these profiles became a shorthand term used to refer to the “profile” as a whole, these were: “Undetectable”, “Emoji”, “Couple”, “History” and “Disclosure”.

The intention behind creating a generic profile format, rather than echoing the design language of a specific application was both to make the profile familiar to participants irrespective of which applications they had used, and to emphasise to participants that these were *mock* profiles, rather than ones collected during the research. Many applications follow a similar format, where users first see a grid composed of the profile photos of nearby users, or a blank photo if a user has not uploaded a photograph. By tapping on one of these photos, users are then taken to the profile associated with it, which includes additional information if this has been provided.¹⁴¹ As well as space for a short free-form biography, the additional information that can be included in a profile is divided into categories, which include physical descriptors such as body type, height and weight; and other categories such as what a user is “looking for”. As Ahlm suggests, this information might be described as ‘sparse’:

¹⁴⁰ See, for example, Groot and others (n 11).

¹⁴¹ Compare, for instance, the format of Grindr and another application, Scruff. See Yoel Roth, ‘Locating the “Scruff Guy”’: Theorizing Body and Space in Gay Geosocial Media’ (2014) 8 *International Journal of Communication* 2113, 2118; Roth, ‘Zero Feet Away: The Digital Geography of Gay Social Media’ (n 60) 439.

Age, height, and weight can be entered as any value. Body type, ethnicity and relationship status can be chosen from a menu. Finally, users can indicate their intentions on the app by choosing any combination of the options: Chat, Dates, Friends, Networking, Relationship, Right Now. Users can also choose not to provide any of this information, though the majority of users choose to include height, weight, ethnicity, and intentions.¹⁴²

Users are typically able to filter who is visible on their homepage using the information in these categories, although not based on HIV disclosure using the features discussed here.¹⁴³ Problems with discriminatory filtering practices, particularly in respect of race and ethnicity,¹⁴⁴ but also extending to fat-shaming and ageism,¹⁴⁵ appear to be common. Recently, Grindr announced that it would be removing the ability to filter based on ethnicity; however, this has yet to be implemented.¹⁴⁶ By focusing upon the information within the profile, the vignettes here do not address, directly, the impact of these filtering features. However, in Chapter 4, I do address the extent to which participants discussed avoiding certain kinds of profile, a quasi-personal-filtering practice.

The five vignettes were divided into two sections within the survey. In the first section, the participants were presented with the first three visual vignettes in turn. The first question for each of these vignettes asked participants to discuss their general impressions of the profile and to produce an account of the person who “created” it. This first question was intended to be somewhat open to interpretation, so that participants felt comfortable with developing their answers

¹⁴² Ahlm (n 20) 368.

¹⁴³ Although the possibility of such a feature has been discussed. See Bobby Rae, ‘Is Grindr about to Introduce a HIV Filter?’ (*Pink News*, 11 July 2016) <<https://www.pinknews.co.uk/2016/07/11/is-grindr-about-to-introduce-a-hiv-filter/>> accessed 5 December 2019.

¹⁴⁴ Ahlm (n 20) 378.

¹⁴⁵ Noto La Diega (n 76) 14–15.

¹⁴⁶ Ben Hunte, ‘Grindr Fails to Remove Ethnicity Filter after Pledge to Do So’ (*BBC News*, 26 June 2020) <<https://www.bbc.co.uk/news/technology-53192465>> accessed 8 August 2020.

based on whatever stood out to them. Riggle and colleagues suggest that ‘some participants may not be able to provide analysis of their own behaviour or motives’.¹⁴⁷ Similarly, here questions asked participants to provide *detail and context* in their responses but did not require them to *explain* or *justify* their assumptions and impressions. After this initial question, more specific questions for each profile highlighted particular aspects of the profile to elicit discussion on narrower points. In the second section of the survey, participants were presented with two visual and narrative vignettes. These consisted of written narrative of a scenario which involved application usage leading to a sexual encounter, both had a completed mock profile to provide additional information but unlike the first three questions this was primarily to complement the vignette text.¹⁴⁸

3.4.1 Vignette 1: “Undetectable”

The first vignette was intended to stimulate discussion of undetectable viral load, the test history feature, and situations where profiles contain potentially conflicting information. This vignette also had the role of introducing the visual elicitation style of questions used in the survey. Consequently, this first mock profile was arguably less complex than the two used in subsequent questions. Despite this, however, participants were not given additional prompts and the first question remained consistent between this vignette and the following two.

To create this image, a stock photo of a man was taken from pexels.com, which offers licence free images which do not require direct attribution. All of the photos

¹⁴⁷ Riggle, Rostosky and Reedy (n 53) 4–5.

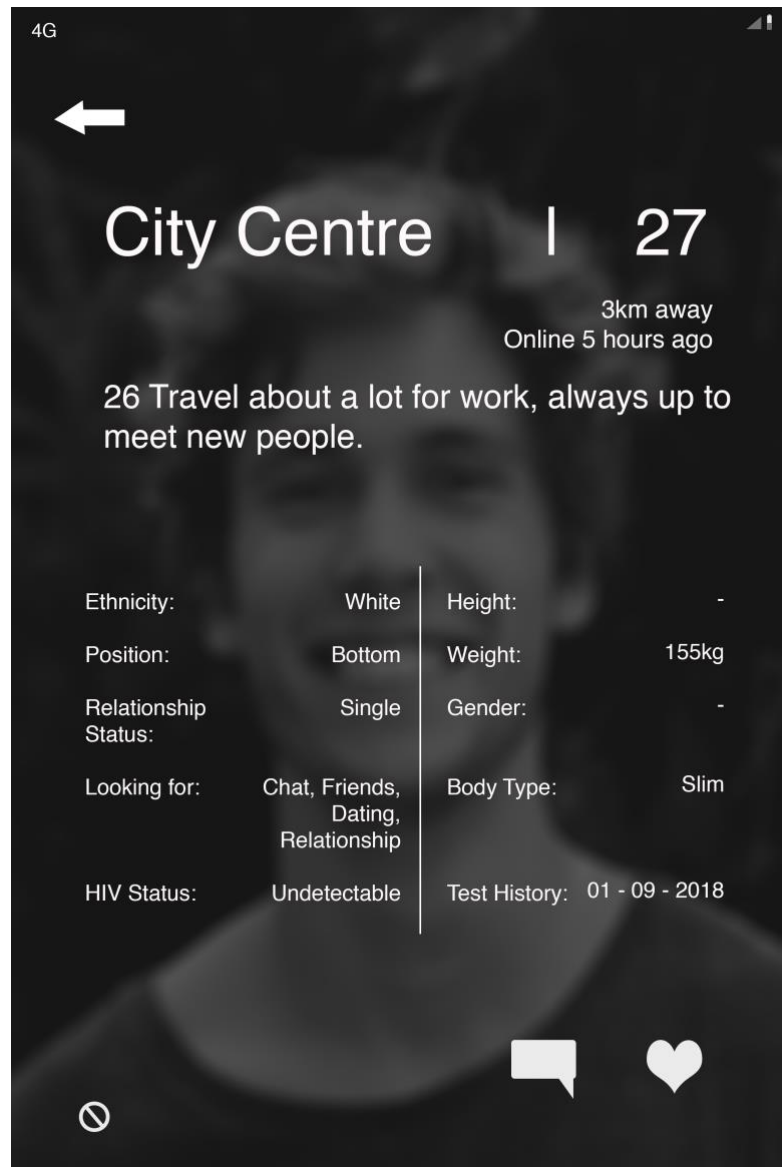
¹⁴⁸ In addition to discussion below, the structure of the survey is reproduced in Appendix 2.

used in subsequent vignettes were also taken from this site. The only limitation imposed by pexels.com is that the people appearing within the photos cannot appear 'in a bad light or a way that is offensive'.¹⁴⁹ Given that the participant information emphasised that the vignettes were mock images, this did not limit the use of the photos here, and, in any event, it is questionable whether any of the characters in the vignettes are portrayed negatively.

Once the photo was selected, it was imported into Photoshop where it became the background layer of the image. Formatting which replicates the general appearance of a mobile phone screen, including signal strength and battery indicators, was added to enhance the realism of the vignette. Text was then overlaid atop the photo, replicating the design of several dating applications. Advertisements, which are a common feature on free versions of applications, were not included. Some applications include static adverts which take up space at the top or bottom of the screen, whilst other applications play short video adverts when navigating between different parts of the app. As the vignettes were themselves static images, the inclusion of video adverts was not possible. Static adverts could have been included but would have taken up space within the profile without being the focus of the investigation. It was decided not to include static adverts, as the profiles did not appear unrealistic in their absence and this provided more space to make the other features of the profile larger and easier to read.

¹⁴⁹ Pexels, 'License of Our Free Stock Photos - Pexels' (2018) <<https://www.pexels.com/photo-license/>> accessed 10 October 2018.

Figure 1: "Undetectable"



One of the primary points of interest within this vignette was participants' reaction to and understanding and interpretation of "undetectable". The inclusion of this identity as 'its own category' reflects the disclosure practices of some HIV+ men,¹⁵⁰ as well as the general prevalence of the term in application disclosure

¹⁵⁰ Daniel Grace and others, 'Becoming "Undetectable": Longitudinal Narratives of Gay Men's Sex Lives After a Recent HIV Diagnosis' (2015) 27 AIDS Education and Prevention 333, 341.

features.¹⁵¹ The profile therefore aimed to elicit discussion which would demonstrate whether participants equated undetectable with being HIV+, or whether the former was seen as ‘somehow *different* than being HIV positive’.¹⁵² In addition, what meaning was prescribed to the “test history” category when an undetectable viral load is disclosed, particularly whether this was seen to relate to viral load testing, other sexual health tests, or a combination of the two was a further point of interest.

This vignette also aimed to prompt discussion about the motivations for application use, particularly whether disclosure of sexual health information was seen as the norm or if it was associated with particular aims, such as seeking casual sexual encounters. Even among men who have sex with men, there continues to be stigmatisation related to HIV status and a perception that HIV is acquired through promiscuous sexual behaviour.¹⁵³ The profile does not list “Right Now” in the “Looking For” section of the profile,¹⁵⁴ nor does the profile explicitly state that a sexual encounter is sought. Whilst the free-form biography does not overly reject the possibility of sexual encounters, it was written generically in order to see what expectations participants would read in to the profile. This point was part of a broader issue of stigma that the profile aimed to address, and a specific follow up question asked participants to discuss whether they expected the user was on the application for any particular purpose.

¹⁵¹ See, for instance, ‘Know Your Status: What Do the Different KYS Options Mean?’ (*Hornet*) <<https://hornet.com/about/know-your-status/>> accessed 15 August 2019.

¹⁵² Mario Brondani, Leeann Donnelly and Jonathan Postnikoff, “‘I’m Not HIV Positive, I’m Undetectable’: Community Forum on Issues of Stigma.” (2016) 1 *Stigma and Health* 244, 6 (emphasis in original).

¹⁵³ Murphy and others (n 123) 1464.

¹⁵⁴ For discussion of the immediacy of some encounters facilitated by applications, see Tien Ee Dominic Yeo and Tsz Hin Fung, “‘Mr Right Now’: Temporality of Relationship Formation on Gay Mobile Dating Apps’ (2018) 6 *Mobile Media and Communication* 3.

The final significant element of the profile was the username and age provided in the header of the profile. Usernames are a critical component of many online spaces. Gatson argues that '[b]ecause screen names are chosen, rather than given, the online handle can be seen as a reflection, at least partially, of the true self.'¹⁵⁵ In contrast to other social networking sites, such as Facebook or Twitter, usernames on applications might be seen as complementing rather than superseding other self-identification taking place in the profile. In further contrast to these sites, where users will search for and identify one another via usernames, as is the case on twitter for instance, the usernames on dating applications are only one form of representation taking place. As a result, the interaction between the username and other parts of the profile was a point of interest here.

Geographic identifiers are common on dating applications. Birnholtz and colleagues note the prevalence of terms which situate the user in a particular neighbourhood, city, state or with a particular institution, such as a college or university.¹⁵⁶ By listing the username of "City Centre" here, the vignette prompts participants to discuss the particular meanings associated with users situating themselves in particular spaces. Birnholtz and colleagues argue that one explanation for this trend is the link between specific locations and particular socio-economic status or other identities, such as status as a student.¹⁵⁷ However, location is also of importance if encounters in the physical world are

¹⁵⁵ Sarah N Gatson, 'Self-Naming Practices on the Internet: Identity, Authenticity, and Community' (2011) 11 *Cultural Studies - Critical Methodologies* 224, 224.

¹⁵⁶ Jeremy Birnholtz and others, 'Identity, Identification and Identifiability', *Proceedings of the 16th international conference on Human-computer interaction with mobile devices & services* (2014).

¹⁵⁷ Birnholtz and others (n 156).

desired or anticipated. Whether and how participants made any connection between the username and other elements of the profile, including the intentions of the user and other aspects of their identity, was therefore one focus during analysis. Similarly, as this information situates the user in the physical world, whether this impacted the apparent trustworthiness of the profile was also of interest.

Given that application users report attaching significant weight to the age disclosed in application profiles and often filter out users who are either too old or too young,¹⁵⁸ the importance of the other element of the header should not be discounted. Here a point of potential ambiguity and confusion was introduced, in order to explore participants' reaction to minor inconsistencies within application profiles. Whereas the age listed in the header was 27, the biography below the header gave the number 26. The discrepancy between the two was kept small in order to see if participants generally overlooked or justified such a discrepancy, or if it was noticed at all.

Finally, an unintended, but consequential, error within the profile must be acknowledged. Confusion between imperial and metric measurements meant that the weights given in this profile and the third vignette, below, were significantly higher than intended. Although this was originally a mistake on my part, the extent to which this error went unnoticed or was dismissed by participants came to be of interest. When I later noted the error, therefore, I retained the mistake within both profiles, which also meant that all participants

¹⁵⁸ Brandon Andrew Robinson, "'Personal Preference' as the New Racism" (2015) 1 *Sociology of Race and Ethnicity* 317.

were presented with the same stimuli. In Chapter 5, I note how inconsistencies within the profile undermined confidence in other information disclosed in the profile, such as test history, and in Chapter 6, I demonstrate how errors of this kind can lead users to be concerned about fake profiles and what is often termed “catfishing”.¹⁵⁹

3.4.2 Vignette 2: “Emoji”

As discussed above, emoji are, along with photographs and written text, a core factor in the visuality of application profiles. The second vignette was therefore intended to elicit discussion of these symbols, in addition to prompting discussion regarding photo-less profiles, incomplete or missing information and explicit sex-seeking behaviour. Very little text was used in the profile, beyond the text which acts as the formatting for the mock application. Only including emoji in the *about me* section of the profile might be somewhat hyperbolic as emoji are commonly utilised as well as, rather than instead of, text.¹⁶⁰ However, this exaggeration makes the focus of the profile immediately clear to participants and enables the issues of emoji ambiguity to be addressed in a single profile.

Selecting which emoji to include in the profile was a particular challenge. Moses suggests that whilst emoji are not uncommon in application profiles, the use of them is inconsistent and often limited to users in specific sub-communities, such as older users.¹⁶¹ Some thought was given to using emoji with specific cultural

¹⁵⁹ See Carolyn Lauckner and others, “Catfishing,” Cyberbullying, and Coercion: An Exploration of the Risks Associated with Dating App Use among Rural Sexual Minority Males’ (2019) 23 *Journal of Gay and Lesbian Mental Health* 289.

¹⁶⁰ Gawne and McCulloch (n 70).

¹⁶¹ Moses (n 75) 27–30.

connotations, such as the emoji representing the biohazard symbol, which has historically been associated with serostatus.¹⁶² However, this would have made the vignette highly specific, rather than prompting participants to reflect more generally on application use. On some applications, there are also restrictions on the use of this and other emoji with cultural connotations.¹⁶³ Nevertheless, future research may wish to build on the analysis of this vignette, discussed below, and explore whether these symbols continue to have their historic connotations.





Emoji are governed through the Unicode consortium. The consortium gives each new emoji a unique identifying code and a short descriptive name. For example, 'U+1F920' is named 'cowboy hat face'.¹⁶⁴ These names and codes remain consistent across platforms and devices, however each platform retains some control over the pictographic image visible to the end user. This means that the same Unicode identifying code can produce dissimilar emoji on different platforms. This difference can be observed, for instance, when comparing the same emoji on an iOS device and an android device.¹⁶⁵ The inconsistency this creates extends as far as the formatting of this thesis, as Word utilises its own emoji character set, although such issues were avoided by formatting the table below separately before copying it into this document. The emoji chosen, listed in Table 1, were taken from the Apple emoji keyboard, which can be utilised in the photoshop software used to create the vignettes.

¹⁶² Dan Brouwer, 'The Precarious Visibility Politics of Self-Stigmatization: The Case of HIV/AIDS Tattoos' (1998) 18 *Text and Performance Quarterly* 114.

¹⁶³ Grindr, in particular, prohibits the use of the Biohazard emoji along with other emoji associated with drug use. Despite this, an emoji of a B inside a box, associated with 'bareback', or condomless, sex continues to be prevalent. See 'Grindr's Gaymoji: Pierced Aubergines, a Peach on a Plate – and a Banned "T"' (n 69).

¹⁶⁴ Unicode Inc (n 68).

¹⁶⁵ Morstatter and others (n 71).

Table 1: Emoji Definitions		
Unicode ID	Unicode CLDR¹⁶⁶ Short Name	Apple Symbol
U+1F494	Broken Heart	
U+F440	Eyes	
U+2B06	Up Arrow	
U+2B07	Down Arrow	
U+1F3CD	Motorbike	
U+1F4AC	Speech Balloon	
U+1F444	Mouth	
U+1F6AD	No Smoking	
U+1F51E	No One Under Eighteen	
U+1F6AB	Prohibited	
U+270A	Raised Fist	
U+1F346	Eggplant	
U+1F4A6	Sweat Droplets	
U+1F351	Peach	
U+aF37B	Clinking Beer Mugs	

The choice of Apple's character set was deliberate, as it was expected most participants would have at least a passing familiarity with it. Although when used across platforms, emoji are typically formatted based on the recipient's device;

¹⁶⁶ CLDR, the Common Local Data Repository, is an online resource designed for reference. It is managed by Unicode.

even those who do not use iOS devices are likely to have seen Apple's set used in popular culture. The availability of Apple's set on photoshop mean that these symbols often feature in marketing, appearing, for instance, on the cover of Marcel Danesi's book on the semiotics of Emoji.¹⁶⁷ The choice of specific characters from within this set was guided by the common use of certain emoji on applications. For instance, certain commonly used emoji are understood by some to indicate preferred sexual positions,¹⁶⁸ and some emoji, such as the ubiquitous "eggplant", are understood to refer to body parts.¹⁶⁹ However, in order to introduce a degree of ambiguity, emoji of faces were not included. Whilst the use of face emoji is common, non-face emoji create more ambiguity, particularly in relation to issues such as identity.¹⁷⁰

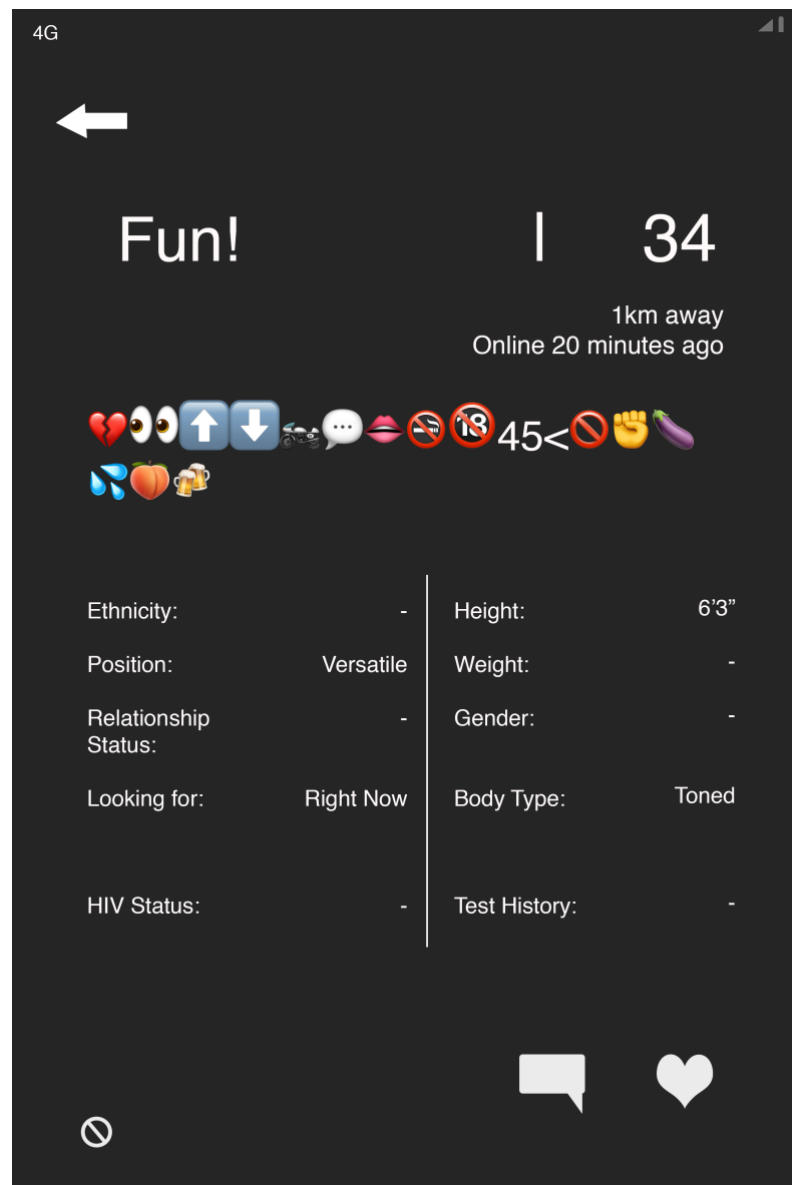
¹⁶⁷ Marcel Danesi, *The Semiotics of Emoji: The Rise of Visual Language in the Age of the Internet* (Bloomsbury Academic 2017).

¹⁶⁸ Yoel Roth, "'No Overly Suggestive Photos of Any Kind': Content Management and the Policing of Self in Gay Digital Communities' (2015) 8 *Communication, Culture and Critique* 414.

¹⁶⁹ Moses (n 75).

¹⁷⁰ Monica A Riordan, 'The Communicative Role of Non-Face Emojis: Affect and Disambiguation' (2017) 76 *Computers in Human Behavior* 75.

Figure 2: "Emoji"



3.4.3 Vignette 3: "Couple"

The third vignette was designed to elicit discussion regarding shared application profiles. Shared profiles are not the norm on dating applications. Macapagal et al found that 6% of participants in their research reported making use of a shared profile.¹⁷¹ However, despite this being a minority of users, shared profiles are not

¹⁷¹ Macapagal and others (n 116).

so uncommon as to be unexpected, and they present particular challenges in respect of HIV disclosure and the disclosure of other information. Shared profiles have received little attention within existing literature. Research into application use in the context of (monogamous and non-monogamous) relationships has primarily addressed the impact of application use on the relationship itself, as well as analysing the influence of applications on homosocial interaction between men who have sex with men more broadly.¹⁷² In Chapter 4, I build on this literature, addressing participants' perceptions and assumptions surrounding application use by couples and, particularly, the influence that relationship status has on expectations of risk-taking.

Typically, most applications provide space for relationship status to be disclosed. In some instances, users can write a short description themselves, but more commonly users have to select from a closed list of predetermined responses. Similarly, in other categories, such as "body type", "age" and, critically, "HIV Status" users are similarly limited to selecting one option from these lists, limiting the extent to which they are able to present a multifaceted identity.¹⁷³ One, perhaps unintentional, consequence of this restriction is the challenge of creating a profile which is able to represent the disparate characteristics of two people. In this vignette, this issue was emphasised to participants by the inclusion of two numbers at the beginning of the biography, one of which matched the age listed in the profile header. After the first, general, question regarding their impressions of the profile, one of the follow-up questions for this vignette specifically asked

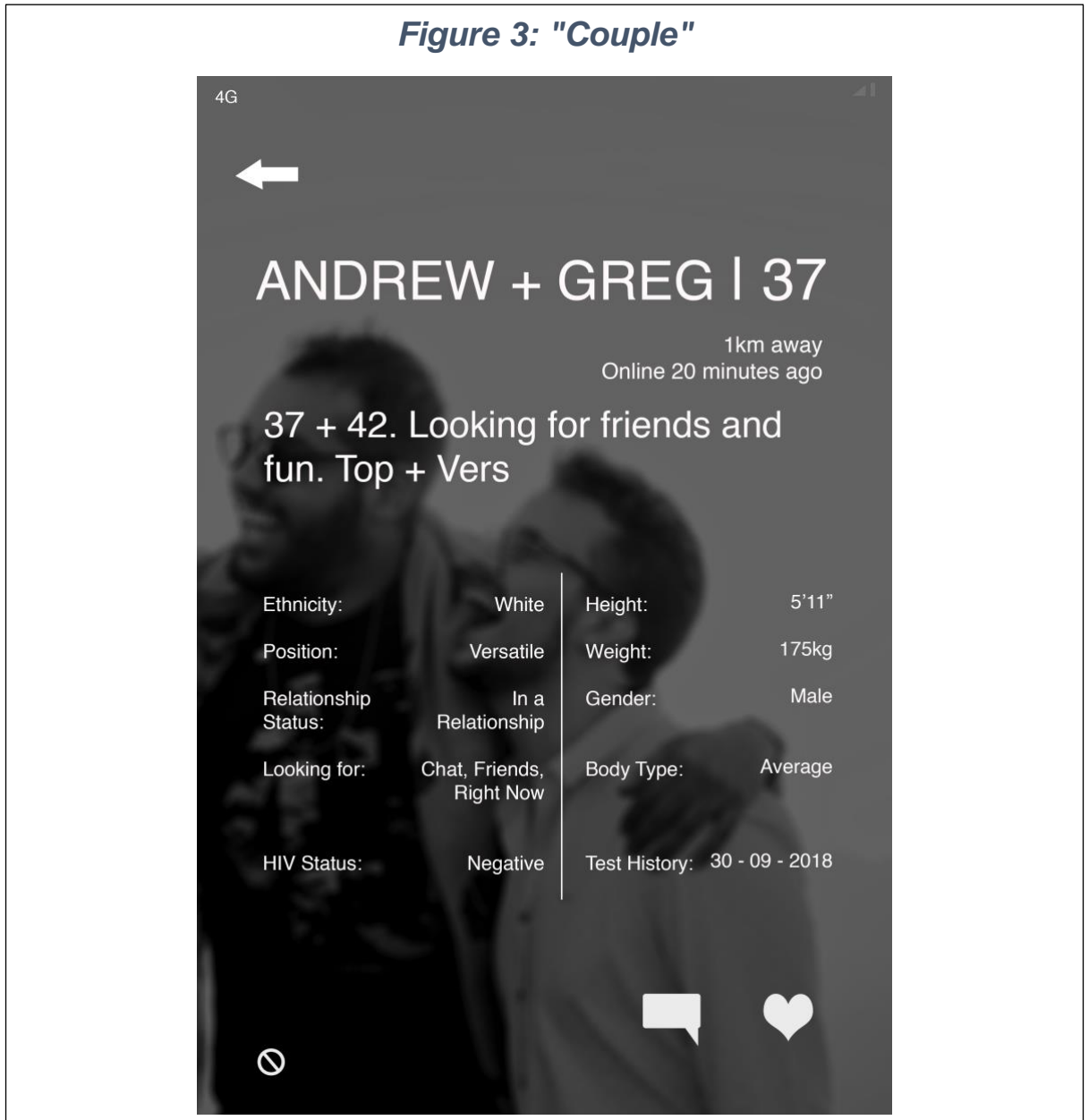
¹⁷² David Gudelunas, 'There's an App for That: The Uses and Gratifications of Online Social Networks for Gay Men' (2012) 16 *Sexuality and Culture* 347.

¹⁷³ In some instances, this limitation can be lifted by accessing the paid-for version of the application, effectively commodifying the ability to present a diverse identity.

participants about the “shared” ownership of the profile and how they interpreted the information which might only apply to one character or the other, such as body type, weight and HIV status.

The photograph used in this profile was particularly difficult to source. Searching the same stock photo site as the other images, and others, there were decidedly few results for searches of “gay couples”, “same-sex couples” and “male couples”. Most results returned by these searches were clearly taken by professional photographers. Although professional photos are seen on applications, they are less common. Introducing this uncommon feature to the vignette did not seem appropriate, as, in the context of the vignette technique, it may emphasise the manufactured status of the mock profiles and disrupt any suspension of disbelief on the part of participants when completing the task. Instead, a photo of a group was chosen, which was then edited to focus on two men within it. This seemed preferable, as once the text of the profile was overlaid onto the image, it then appeared reasonably realistic for the purposes of eliciting participants’ responses.

Figure 3: "Couple"



3.4.4 Vignette 4: "History"


The fourth vignette was the first of the two written and visual vignettes, which might be equated more closely with story completion tasks, such as those used by Braun and Clarke,¹⁷⁴ among others.¹⁷⁵ The written narrative

¹⁷⁴ Braun and Clarke, *Successful Qualitative Research* (n 7) 142–145.

¹⁷⁵ See, generally, the special edition introduced in Victoria Clarke and others, 'Editorial Introduction to the Special Issue: Using Story Completion Methods in Qualitative Research' (2019) 16 *Qualitative Research in Psychology* 1.

accompanying this image was positioned to the right of the image, or on some mobile devices below the image where there was insufficient room at the side. This was done in order to encourage participants to look at the image, before then considering the text. The primary focus of this vignette was the test history feature that accompanies the status disclosure feature on many applications; in addition, the vignette also addressed non-HIV sexual health and also considered the role of profile pictures, alongside vignette two, above.

Figure 4: "History"



The screenshot shows a mobile app profile for a user named Ben. At the top, there is a back arrow, the name 'Ben', a vertical bar, and the age '28'. Below this, it says '4km away Online'. The user's bio reads 'Grad Scheme Business Manager. Gym/Running Buddies to the front.' Below the bio is a table of personal details:

Ethnicity:	Black	Height:	5'8"
Position:	Top	Weight:	-
Relationship Status:	Single	Gender:	-
Looking for:	Friends, Right Now	Body Type:	Athletic
HIV Status:	Negative	Test History:	13 - 06 - 2018

At the bottom of the profile, there are icons for a speech bubble and a heart. A small 'no' symbol is visible in the bottom left corner of the app interface.

Ben finds out at his regular sexual health screening that he has Gonorrhoea, the doctor gives him antibiotics to treat the infection.

The doctor tells him that Gonorrhoea can sometimes be resistant to antibiotics, these antibiotics take up to two weeks to work, and they won't know for certain that the treatment has worked until his follow up appointment a month later.

Two weeks later, Ben uses the app to look for casual sex. He plans to use condoms with anyone he meets as he has read this greatly reduces the chance of passing the infection on.

This vignette aimed to elicit discussion of sexual health, more generally, in order to place HIV transmission within a broader context. Infections such as gonorrhoea,¹⁷⁶ which is typically treatable with antibiotics, remain prevalent across England and Wales. Concern about this prevalence was noted by the Court of Appeal in *Dica*.¹⁷⁷ Subsequently, gonorrhoea has been one of a limited range of infections which have been the subject of a successful prosecution in England and Wales.¹⁷⁸ Although, as I have discussed elsewhere,¹⁷⁹ the circumstances of the one case where this took place were sufficiently unusual for it to be considered an outlier among transmission case law. Nevertheless, concern about antibiotic resistant strains of otherwise treatable infections and the potential for “super” strains have received significant media attention in recent years.¹⁸⁰ Furthermore, increased rates of these treatable infections have been associated with application use,¹⁸¹ similar to the suggestion that there is an association between application use and HIV transmission, which I noted in Chapter 1. As such, this vignette aimed to elicit discussion about these other sexual health risks, to see if participants saw them as comparable or distinguishable from concerns surrounding HIV.¹⁸²

¹⁷⁶ The American spelling of Gonorrhoea, which is used in some literature, was used in the vignette itself and is reproduced above for accuracy. However, the typical English spelling is used elsewhere throughout the remainder of this thesis.

¹⁷⁷ *R v Dica* [2004] EWCA Crim 1103 [2].

¹⁷⁸ *R v Marangwanda (Peace)* [2009] EWCA Crim 60.

¹⁷⁹ Cameron Giles, ‘A Sexual Harm?: HIV Transmission, “Biological” GBH, and Ancillary Sentencing Provisions in England and Wales’ [2020] *Journal of Criminal Law* (forthcoming).

¹⁸⁰ James Gallagher, ‘Man Has “world’s Worst” Super-Gonorrhoea’ (*BBC News*, 28 March 2018) <<https://www.bbc.co.uk/news/health-43571120>>.

¹⁸¹ Matthew R Beymer and others, ‘Sex on Demand: Geosocial Networking Phone Apps and Risk of Sexually Transmitted Infections among a Cross-Sectional Sample of Men Who Have Sex with Men in Los Angeles County.’ (2014) 90 *Sexually transmitted infections* 567.

¹⁸² Given the recency of the gonorrhoea diagnosis, it would be possible that Ben’s test was inside the window period where a HIV infection might not be detected by a sexual health screen. However, no attempt to highlight this was made and no responses raised this concern.

As part of this vignette, participants were asked to discuss the process of updating a profile with new information. Similar to the age discrepancy in Vignette 1, one of the aims here was to explore whether profiles are understood as static artefacts, or as something to be continually modified and updated. Given that information such as Test History and HIV status may change and become outdated, this is particularly relevant to the honesty or dishonesty of representations made through profiles. As I will go on to discuss, below, participants' responses to these issues demonstrated several distinct ways of interpreting and understanding time, which became critical to later analysis.

Other issues within this vignette included the lack of a profile picture and the use of a given name as the username for the profile. Given the importance of usernames, as noted above,¹⁸³ this vignette aimed to elicit discussion of the different degrees to which application users are able to reveal or conceal information about themselves. In particular, whether participants interpreted concealment or disclosure of some information as normal or unusual was a point of particular interest, especially when some information, such as HIV status, race, or age, can result in social stigma.¹⁸⁴

3.4.5 Vignette 5: “Disclosure”

The final vignette again combined a mock profile with a short narrative as part of a visual and written vignette. The purpose of this set of questions was to elicit

¹⁸³ Gatson (n 155).

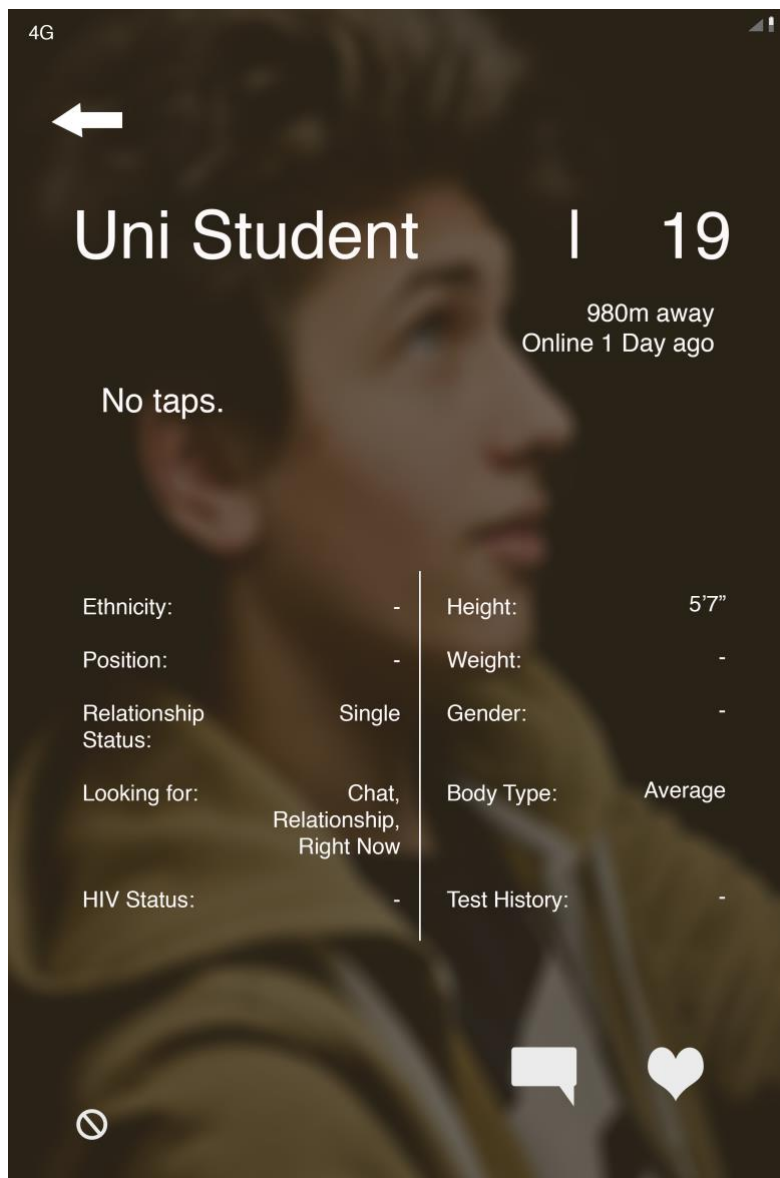
¹⁸⁴ See, for instance, Colin Fitzpatrick, Jeremy Birnholtz and Jed R Brubaker, 'Social and Personal Disclosure in a Location-Based Real Time Dating App', *48th Hawaii International Conference on System Sciences* (2015).

discussion of disclosure, the adequacy of *treatment as prevention* as an alternative to disclosure, and the distribution of responsibility between sexual partners. In the written narrative, participants are told that the character in this scenario understands themselves to have an undetectable viral load. However, in contrast to Vignette 1, this information is not disclosed in the mock profile. Participants are not told the rationale behind the character's choice not to include this information, instead the questions participants were asked aimed to elicit discussion of disclosure and any perceived challenges to disclosure participants expected or understood.

One of the aims of this vignette was, also, to prompt discussion of the law and to explore whether participants were aware of the specific legal obligations placed on people living with HIV. How these related to, contrasted with or superseded social or moral obligations to disclose was a point of particular interest. Given that prior research has demonstrated that awareness of the law can be limited or incorrect,¹⁸⁵ this question provided an opportunity to explore whether this continues to be the case (particularly important given the developments in treatment and prevention discussed in Chapter 2) or whether applications have an impact on their users' understanding of disclosure obligations and the law.

¹⁸⁵ Catherine Dodds, Adam Bourne and Matthew Weait, 'Responses to Criminal Prosecutions for HIV Transmission among Gay Men with HIV in England and Wales' (2009) 17 *Reproductive Health Matters* 135; Matthew D Phillips and Gabriel Schembri, 'Narratives of HIV: Measuring Understanding of HIV and the Law in HIV-Positive Patients' (2016) 42 *Journal of Family Planning and Reproductive Health Care* 30.

Figure 5: "Disclosure"



Ari is HIV+. He knows from his doctor that he has an undetectable viral load and that this means he can't pass the virus on. This is his current dating app profile.

Ari arranges a hook up with someone called Charlie, who agrees to come around to Ari's house. Before he arrives, Charlie sends a message saying "Btw, what's your status".

One final point addressed by this vignette was the issue of post-intercourse disclosure. Participants were asked whether they perceived disclosure obligations differently if questions about status were asked after intercourse. This provided a further opportunity for participants to reflect on the rationale behind non-disclosure and whether non-disclosure might be because of concern about

stigma.¹⁸⁶ It was also intended to elicit data relevant to the issue of “conditional” consent, discussed in Chapter 2, and the assumptions of the HIV-negative character in the vignette.

3.5 Data Collection and Response Rate

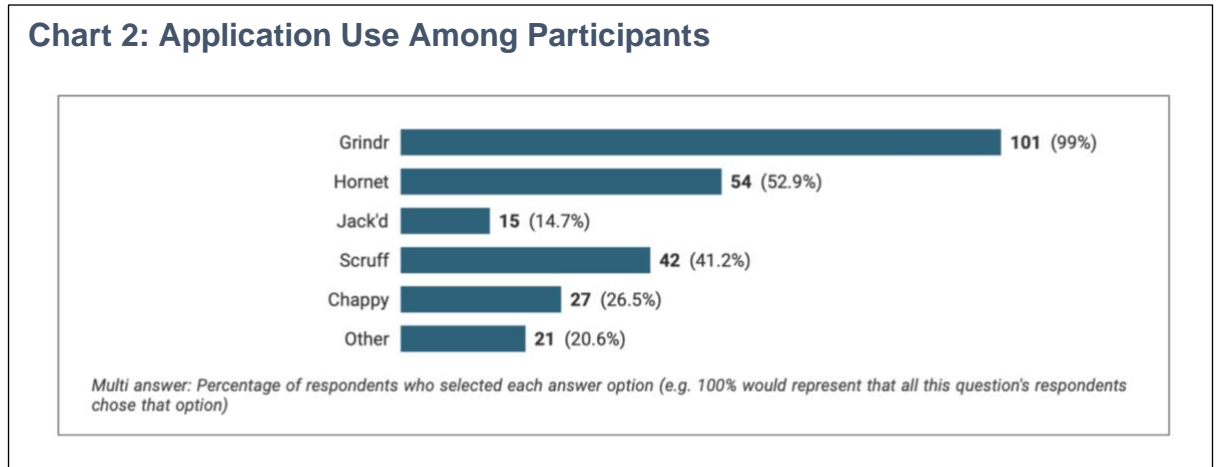
Recruitment and data collection in the project were carried out between October 9th, 2018 and May 27th, 2019, during which time 102 participants completed the survey. The length and detail provided in responses did vary and some responses were so brief that only one or two codes were applied to them.¹⁸⁷ No responses were excluded from analysis, as whilst some were less detailed no participant responded in a wholly trivial manner. Participants were not asked to report how they came to be aware of the survey. However, as I promoted social media recruitment and spent time recruiting via applications on different days, it is possible to anecdotally suggest that both recruitment methods were reasonably effective.

As shown in Chart 2, the overwhelming majority of participants make use of Grindr, with only one participant (who exclusively used Hornet) not doing so. Participants were able to provide additional answers beyond the options given in the survey, with 21 choosing to do so. Among these 21, Tinder (11) was the most common additional choice, followed by Recon (6), with several apps reported by a single participant (Squirt, BiggerCity, Chasabl, Fabguys, NakedMates,

¹⁸⁶ On this point, see, for instance, Andrew Spieldenner, ‘PrEP Whores and HIV Prevention: The Queer Communication of HIV Pre-Exposure Prophylaxis (PrEP)’ (2016) 63 *Journal of Homosexuality* 1685; Robinson (n 158).

¹⁸⁷ As noted above, shorter responses are a common feature of story completion tasks, but still provide a rich source of data for analysis. See Terry and Braun (n 99).

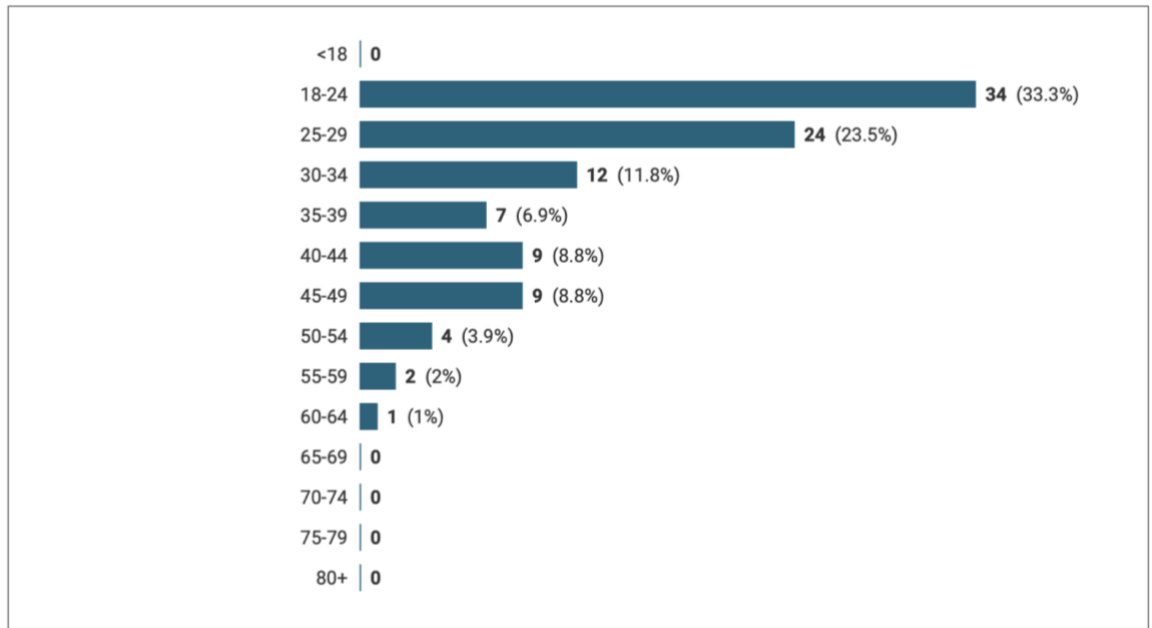
HotOrNot, Gayromeo, OKCupid, Grommr, Fitlads, Fridae) or only two participants (Gaydar, GrowlR, Surge, PlentyofFish, Badoo).



Given that application-based recruitment took place on Grindr and Hornet, that these are the two most reported apps is unsurprising. That all but one participant reported using Grindr is similarly unsurprising when taking into consideration its market dominance. Nevertheless, the lack of participants with experience of only applications other than Grindr remains a limitation of this project. Future research may wish to consider whether other applications have their own unique forms of contextual knowledge, disclosure expectations and ways of being used.

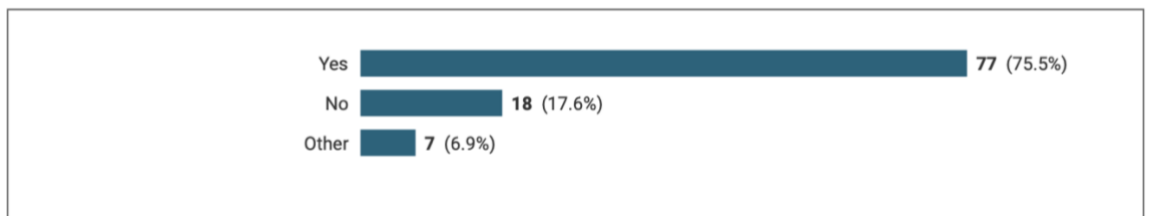
When broken down by age, the majority of participants in this project were younger, with the oldest participant being in the 60-64 age bracket. This may reflect a demographic trend in the userbase of many applications, however, as most major applications do not release information about the demographic breakdown of their users, it is not possible to verify this point.

Chart 3: Participant Reported Age Breakdown



At the end of the survey, participants were asked whether they had been aware that those with an undetectable viral load cannot transmit the virus during intercourse, prior to taking part in this research. For those participants who were not previously aware of this, a link was given which provided more information on treatment as prevention.

Chart 4: Prior Awareness of Undetectable = Untransmittable (TasP)



As I go on to discuss in Chapter 4, some participants drew on detailed medical knowledge of TasP in their responses. However, several participants also

expressed doubts over the efficacy of U=U. Those in the “Other” category, who were provided with a short text box in which to explain their response, discussed being aware of public health campaigns about TasP or hearing about U=U through word-of-mouth but feeling as if they had insufficient information to feel confident concerning it. Participants were also provided a final box for any comments they wished to make and several participants who were aware of TasP echoed these points. One participant, in particular, suggested that there needed to be a public health campaign involving TV materials to promote a broader awareness of TasP and HIV health.¹⁸⁸

3.6 Data Analysis and Analytic Perspectives

One of the advantages of the digital data collection methods used here is the ease with which responses can be downloaded in full, without the need for transcription or modification by the researcher. As noted above, this meant that quotations taken from participants’ responses could be presented verbatim in this and subsequent chapters.¹⁸⁹ This also enabled responses to be downloaded and imported into the qualitative analysis program NVivo,¹⁹⁰ where they could undergo thematic analysis.

Braun and Clarke argue that thematic analysis (“TA”) is ‘a poorly demarcated, rarely acknowledged, yet widely used qualitative analytic method’ which ‘offers an accessible and theoretically flexible approach to analysing qualitative data’.¹⁹¹

¹⁸⁸ Participant 401353-401344-41722354

¹⁸⁹ 84 of the 102 participants who took part in the project are quoted directly in subsequent chapters, as representative of the themes developed from the data.

¹⁹⁰ Specifically, Nvivo Version 12.

¹⁹¹ Virginia Braun and Victoria Clarke, ‘Using Thematic Analysis in Psychology’ (2006) 3 *Qualitative Research in Psychology* 77, 77.

At a fundamental level, TA involves coding the data by identifying pertinent points within responses, guided by the overall research question, then using these codes as the foundation for broader themes. As Braun and Clarke explain:

Codes are the smallest units of analysis that capture interesting features of the data (potentially) relevant to the research question. Codes are the building blocks for themes, (larger) patterns of meaning, underpinned by a central organizing concept – a shared core idea. Themes provide a framework for organizing and reporting the researcher’s analytic observations.¹⁹²

TA, when used within a constructionist project, as is the case here, shares some similarities with constructionist grounded theory approaches to data analysis.¹⁹³

As with grounded theory, the themes and concepts explored in the following three chapters were developed from within the data. However, unlike grounded theory, TA does not require the researcher to commit to what might be described as the ‘prescriptive and purist’ ideals of grounded theory such as line-by-line coding.¹⁹⁴

Braun and Clarke indeed emphasise that many researchers ‘do not appear to fully subscribe to the theoretical commitments of a ‘full-fat’ grounded theory’ instead carrying out what they term ‘essentially grounded theory “lite”’.¹⁹⁵

TA offers a suitable alternative to this GT-*lite* approach, avoiding concerns such as those articulated by Tolhurst that grounded theory is employed ‘more [due] to its efficacy as a legitimating tool (in the face of the ascendant biological sciences) than its ability to guide research in a clear and helpful fashion’.¹⁹⁶ As Grey states,

¹⁹² Victoria Clarke and Virginia Braun, ‘Thematic Analysis’ (2017) 12 *Journal of Positive Psychology* 297, 297.

¹⁹³ For an overview of constructionist grounded theory, see Jane Mills, Ann Bonner and Karen Francis, ‘The Development of Constructivist Grounded Theory’ (2006) 5 *International Journal of Qualitative Methods* 25.

¹⁹⁴ Braun and Clarke, *Successful Qualitative Research* (n 7) 185–187.

¹⁹⁵ Braun and Clarke, ‘Using Thematic Analysis in Psychology’ (n 191) 81.

¹⁹⁶ Edward Tolhurst, ‘Grounded Theory Method: Sociology’s Quest for Exclusive Items of Inquiry’ (2012) 13 *Forum: Qualitative Social Research Article* 26.

TA's 'flexibility allows the exploration of new ideas, drawing on participants' answers, which will provide an ecologically grounded' form of analysis.¹⁹⁷

TA also enables the researcher to draw upon existing theories and models when analysing responses and developing themes from the codes applied to the data. In this project, as themes were developed, the literature discussed in Chapter 2 prompted these themes to be organised into the three subsequent chapters. Each of these chapters was then able to draw on particular analytic perspectives, which I summarise below, which I explore using the data.¹⁹⁸

3.6.1 Time and Space

In Chapter 4, the themes of "Risk", "Safety", "Avoidance", "Stigma" and "Emotion" are discussed with particular reference to the spatial and temporal assumptions and frameworks that accompany them. This is done by drawing upon the concept of the "chronotope" and "chronotopic" analysis developed in legal literature by Valverde.¹⁹⁹ As I will discuss in Chapter 4, chronotopes are specific assumptions about the operation of space and time, which can vary when looking at particular concepts or settings; chronotopic analysis therefore enables the spacio-temporal specificities of particular concepts to be explored and discussed.²⁰⁰ Whilst Valverde herself focuses upon chronotopes within particular spaces, I focus upon chronotopes operating at particular scales, specifically at the level of the

¹⁹⁷ Jacqueline M Gray, 'What Constitutes a "Reasonable Belief" in Consent to Sex? A Thematic Analysis' (2015) 21 *Journal of Sexual Aggression* 337, 339.

¹⁹⁸ Over the following three chapters, excerpts from participants' responses are used to illustrate the arguments in my analysis. Other than minor formatting adjustments, these are presented as written by participants, without corrections to spelling or grammar.

¹⁹⁹ See Mariana Valverde, *Chronotopes of Law: Jurisdiction, Scale and Governance* (Routledge 2015) .

²⁰⁰ See Ch 4 and, also, Valverde (n 199) 177.

individual and sexual community. I demonstrate how these themes each have particular temporal connotations and assumptions which are linked with participants' constructions of obligation and responsibility.

3.6.2 Obligation and Consent

In Chapter 5, I address the limitations of consent within the current approach to HIV transmission offences and introduce the themes of "Trust", "Privacy", "Knowledge", "Disclosure" and "Consent". I illustrate how the assumptions about time and space, identified in Chapter 4, relate to the contractual approach to consent in transmission case law, as seen in Chapter 2. This chapter, therefore, draws upon the concept of "conditional consent" and "materiality" and demonstrates how these concepts do not necessarily conform with the context specific meanings participants discussed in their responses.

3.6.2 Responsibility and Law

Responsibilisation, which I introduced in Chapter 2, acts as the analytic lens through which I explore participants' understanding of the law and application of legal concepts to the issue of HIV disclosure and non-disclosure in Chapter 6. The themes of "Intent", "Law" and "Responsibility" are explored, and I demonstrate how responsibility for HIV prevention is often constructed as limited or one-sided. As I will discuss in Chapter 6, responsibilisation in the context of HIV transmission can also be connected with the concept of the "other" – a

concept seen in the literature relating to the “risk society”.²⁰¹ I explore the limitations of the law in addressing these concerns, highlighting how both reinforce individualistic narratives relating to HIV prevention which the current law on HIV transmission incorporates.

3.7 Concluding Remarks

In this chapter, I have set out the approach to data collection taken in this project. This has involved a novel use of visual elicitation methods adapted for the purpose of investigating the context dependent meanings and understandings of current and recent application users in relation to sexual health, generally, and HIV disclosure via mobile dating applications, specifically. As I have demonstrated, the visual vignette technique here enabled detailed and informative responses to be collected from participants. I have also illustrated that whilst the relative realism of the vignettes is important for the purpose of eliciting this data; their fictitious status does not limit the findings of this project, which is interested in participants’ knowledge and understanding. Although participants were not asked about their own profiles or their trust in the profiles of others they encounter online, which would introduce additional ethical challenges surrounding the reproduction of data in this work, this methodology enables the context in which these practices take place to be examined. Rather than capturing how the individual participants who took part in the project would react specifically to the scenarios depicted in the vignettes, this instead facilitates a detailed examination of the beliefs and attitudes relevant to HIV disclosure on applications

²⁰¹ See Matthew Weait, *Intimacy and Responsibility: The Criminalisation of HIV Transmission* (Routledge-Cavendish 2007) 129–130.

aimed at men who have sex with men, more broadly, enabling the analysis of legally relevant concepts presented over the following three chapters.

One limitation which should be acknowledged at this stage stems from the ongoing (re-)development of these applications and online dating/social networking more generally. Since the beginning of this project applications have not remained static and, as has been the case with earlier work relating to online dating websites,²⁰² new features have been introduced and existing features altered or removed. Other than longitudinal projects, keeping pace with this ongoing change is a challenge for any researcher. However, the HIV disclosure features which are at the core of this study continue to be used on several applications and this continuation emphasises the significance of this research as a whole. What has been, of course, unexpected and likely disruptive on the expectations and knowledge discussed in subsequent chapters, is the emergence of COVID-19. Attitudes towards testing, treatment and disclosure of short and long-term health conditions may have been significantly impacted by COVID. Whilst the data here pre-dates the current pandemic, it does offer a suitable foundation for future research addressing future developments in the digital disclosure of personal health information.²⁰³

²⁰² Amy Shea, 'Race, K. The Gay Science: Intimate Experiments with the Problem of HIV' (2018) 40 *Sociology of Health & Illness* 925.

²⁰³ Paul Waugh, 'NHS Test and Trace Phone App To Be "Rolled Out in Next Few Weeks"' (*Huffington Post*, 28 July 2020) <https://www.huffingtonpost.co.uk/entry/nhs-test-and-trace-phone-app-riordan-next-few-weeks_uk_5f1ff10fc5b638cfec4996de> accessed 30 July 2020.

Chapter 4: Risk, Safety, and Other Core Concepts

4.1 Introduction

Chapter 2 noted how the criminalisation of HIV transmission is often justified through reference to conceptualisations of risk, responsibility and trust which are overly simplistic. I observed the manner in which the perceived culpable behaviour of the proposed defendant is closely associated with (in some cases actually being) perceived breaches of norms of sexual responsibility and citizenship. Building on this discussion, this chapter explores participants' accounts of risk and safety, as well as highlighting how emotion and stigma can be seen running throughout elements of these accounts. As discussed in the previous chapter, it draws upon the recent analysis of Mariana Valverde and her adaptation of Mikhail Bakhtin's theory of the chronotope,¹ demonstrating the role of time in these concepts, as well as the relationship between time and the legal concepts discussed in Chapters 5 and 6.

The chronotope can be conceptualised as a socially constructed spacio-temporal framework of analysis,² that is to say a means of understanding the particular space-time characteristics of a phenomenon.³ Although originally a literary theory for understanding the way that 'space and time vary in *qualities*, [and] different social activities and representations of those activities presume different kinds of

¹ Mariana Valverde, *Chronotopes of Law: Jurisdiction, Scale and Governance* (Routledge 2015).

² Kristiina Kumpulainen, Anna Mikkola and Anna Mari Jaatinen, 'The Chronotopes of Technology-Mediated Creative Learning Practices in an Elementary School Community' (2014) 39 *Learning, Media and Technology* 53, 56.

³ See Dawn Moore and Mariana Valverde, 'Maidens at Risk: "Date Rape Drugs" and the Formation of Hybrid Risk Knowledges' (2000) 29 *Economy and Society* 514, 516; also, Garry Saul Morson and Caryl Emerson, *Mikhail Bakhtin: Creation of a Prosaics* (Stanford University Press 1990) 367–369.

time and space',⁴ chronotopes offer a useful analytic framework for legal concepts. Valverde, for instance, highlights how 'standards of proof and burdens of proof that are found in criminal but not civil law *set up and presuppose* specific spatiotemporal dynamics.'⁵ This is not to suggest that chronotopes actually exist,⁶ instead chronotopes should be seen as a way of interrogating the way that concepts produce and are produced by different conceptualisations of space and time.⁷

In his review of Valverde's book on chronotopes of law, Harrington suggests that chronotopes are 'more or less well established in law to the extent that they are persuasive to concrete audiences'.⁸ Here I mean to suggest that chronotopes can be one means of analysing how application users go about using applications and co-producing the concepts of risk, safety and responsibility, in ways which depends on particular types of space-time and which can come in to conflict. In the context of criminal proceedings, I mean to argue that the temptation to see the past as a static, chronological narrative ignores the manner in which the chronotopes of risk, safety and ultimately consent to risk are carried out in practice, and particularly understates the inherent instability and subjectivity of these concepts.⁹

⁴ Morson and Emerson (n 3) 367 (emphasis in original).

⁵ Mariana Valverde, 'What Counts as Theory, Today? A post-philosophical framework for socio-legal empirical research' (2016) 3 *Brazilian Journal of Empirical Legal Studies* 172, 177 (emphasis added).

⁶ Valverde (n 1) 23.

⁷ Suzanne Fraser, 'The Chronotope of the Queue: Methadone Maintenance Treatment and the Production of Time, Space and Subjects' (2006) 17 *International Journal of Drug Policy* 192, 199.

⁸ John Harrington, 'Time and Space in Medical Law: Building on Valverde's Chronotopes of Law' (2015) 23 *Feminist Legal Studies* 361, 362.

⁹ For additional discussion of the limitations of 'static' pasts, see Rachel Loewen Walker, 'The Living Present as a Materialist Feminist Temporality' (2014) 25 *Women* 46; see, also, Moore and Valverde (n 3) in particular, at 517.

4.2 Risk

Epidemiological understanding of HIV transmission risk has developed over time, particularly in respect of condomless sex,¹⁰ and the impact of these developments can be seen in the changing conceptualisation of risk among men who have sex with men.¹¹ Among those who participated in this project, the risk of HIV transmission continued to be a pressing concern. Although risk was discussed in several distinct ways by participants, the need to avoid or minimise exposure to risk was pervasive across the responses.

Many of these respondents discussed risk in a manner which exemplified the scale, tempo, and linearity of risk. The first major theme developed in this section highlights how participants' accounts focused on particular sites of risk, which were depicted in concepts such as the "red flag" mentioned by some participants. Within these discussions, risk was generally constructed as something external to be encountered, rather than as a factor in sexual behaviour. The second theme, discussed below, relates to the differing conceptualisations of the calculability of risk and the extent to which participants perceived risk in both relative and absolutist ways. The third theme highlights the ways in which participants discussed responding to risk, including the role of testing in narratives surrounding risk. The final part of this section brings together the preceding

¹⁰ Brian C Kelly, 'Reconsidering "Unprotected" and HIV Risk in the Twenty-First Century' (2016) 7 *Frontiers in Immunology* 209.

¹¹ See, for instance, Troy P Suarez and others, 'Influence of a Partner's HIV Serostatus, Use of Highly Active Antiretroviral Therapy, and Viral Load on Perceptions of Sexual Risk Behaviour in a Community Sample of Men Who Have Sex With Men' (2001) 28 *Journal of Acquired Immune Deficiency Syndromes* 471; Ingrid Young, Paul Flowers and Lisa Mcdaid, 'Can a Pill Prevent HIV? Negotiating the Biomedicalisation of HIV Prevention' (2016) 38 *Sociology of Health and Illness* 411; Erin M Kahle and others, 'HIV Prioritization and Risk Perception Among an Online Sample of Men Who Have Sex With Men in the United States' (2018) 12 *American Journal of Men's Health* 676.

discussions to explore the chronology of risk and the extent to which risk, conceptually, depends on this chronology.

4.2.1 Encountering Risk

Several participants constructed risk as something to be encountered whilst navigating mobile dating applications. Discussing the visual stimuli, participants highlighted how the information given in, or withheld from, profiles could act as indicators of risk(iness). Not listing a HIV status within the disclosure feature was an example of one such indicator, as discussed by this participant:

“... [The] use of the emojis always makes me think the person is immature. The lack of picture, but describing himself as toned, casts doubt on just how toned he'd be in real life. The choice not to enter a weight backs this up further for me. His lack of info on HIV status concerns me, feels a red flag for his lack of safer sex practices.”¹²

Similarly, other responses demonstrated the central role that HIV transmission risk, as well as risk more generally, continues to play in shaping behaviour whilst using apps. Participants highlighted how encountering perceived risks shaped their interactions with and expectations towards one another:

- “It’s a risky game , always be open”¹³
- “Nobody would be interested in meeting with this person without a credible HIV status because you do not know if this person could have unprotected sex with anyone he meets up with, which could prove dangerous.”¹⁴
- “Risky sexual partner, I like to have a more thorough understanding of a persons sexual health”¹⁵

¹² Participant 401353-401344-42532460

¹³ Participant 401353-401344-41901554

¹⁴ Participant 401353-401344-41612375

¹⁵ Participant 401353-401344-40170291

Risk externalisation has been a common feature of public health messages on HIV/AIDS, which have encouraged individuals to take measures ‘to protect themselves from external perils.’¹⁶ The data here suggests that such messages are incorporated into participants’ perceptions of app profiles. The first excerpt highlights what might be called the general spectre of risk hanging over application use, exemplifying how understanding of risk can be shaped by the sites and scales at which it is identified.¹⁷ Each of the excerpts also demonstrates the extent to which risk is seen as something to be encountered, either generally or, as in the latter two quotes, in the form of an Other to whom the label of “risky” is attached.

The externalisation of risk is consequential, both in terms of how risk is understood, which I address here, and how individuals respond to it, which I address below. Critically, these accounts highlight how risk is understood as unevenly distributed and therefore navigable. Even within the first example, where risk is broadly applied to the “risky game”, the participant emphasises a response (“always be open”) which suggests that communication can aid the identification and management of specific risks. The latter two excerpts do not diminish the importance of this general spectre of risk but, instead, highlight how risks associated with particular contexts still draw upon the idea of other individuals being the source of risk.¹⁸ The individualistic approach to risk

¹⁶ Barry D Adam, ‘Constructing the Neoliberal Sexual Actor: Responsibility and Care of the Self in the Discourse of Barebackers’ (2005) 7 *Culture, Health and Sexuality* 333, 337.

¹⁷ Paul Flowers, Claire Marriott and Graham Hart, ‘The Bars, the Bogs, and the Bushes’: The Impact of Locale on Sexual Cultures’ (2000) 2 *Culture, Health and Sexuality* 69; Niels van Doorn, ‘Treatment Is Prevention: HIV, Emergency and the Biopolitics of Viral Containment’ (2013) 27 *Cultural Studies* 901.

¹⁸ The ‘Others’ of the risk society. See Matthew Weait, *Intimacy and Responsibility: The Criminalisation of HIV Transmission* (Routledge-Cavendish 2007) 129.

reduction related to these conceptions, discussed in further detail below, echoes the narratives of historic government-led public health campaigns, and more recent health organisation messaging.¹⁹

The quotation at the beginning of this section puts forward the concept of the “red flag” of risk, which further demonstrates the individual scale risk operates within on mobile dating applications. The participant highlights the importance of disclosure as a means of overcoming uncertainty, as well as the way certain markers are read as a warning about sexual health risks. Among non-heterosexual men, avoiding discussion of HIV and sexual health is often seen as a signal of HIV-positivity.²⁰ Among heterosexuals, it has been suggested that HIV disclosure is further complicated by a lack of ‘shared culture’ relating to HIV, with disclosure being more closely associated with specific times and settings.²¹ However, as Siegel et al note, the concept of the “red flag” also has a role in heterosexual dating where representations of HIV status tend to be believed in the absence of “red flags”.²²

¹⁹ Adam Burgess, ‘The Development of Risk Politics in the UK: Thatcher’s “Remarkable” but Forgotten “Don’t Die of Ignorance” AIDS Campaign’ (2017) 19 *Health, Risk and Society* 227; Matthew Thomann, “‘On December 1, 2015, Sex Changes. Forever’: Pre-Exposure Prophylaxis and the Pharmaceuticalisation of the Neoliberal Sexual Subject’ (2018) 13 *Global Public Health* 997.

²⁰ Ann O’Leary, ‘Guessing Games: Sex Partner Serostatus Assumptions Among HIV-Positive Gay and Bisexual Men.’ in Perry N Halkitis, Cynthia A Gómez and Richard J Wolitski (eds), *HIV+ sex: The psychological and interpersonal dynamics of HIV-seropositive gay and bisexual men’s relationships*. (American Psychological Association 2006); and, also, Iryna B Zablotska and others, ‘Gay Men’s Current Practice of HIV Seroconcordant Unprotected Anal Intercourse: Serosorting or Seroguessing?’ (2009) 21 *AIDS Care - Psychological and Socio-Medical Aspects of AIDS/HIV* 501.

²¹ Asha Persson and Wendy Richards, ‘From Closet to Heterotopia: A Conceptual Exploration of Disclosure and “passing” among Heterosexuals Living with HIV’ (2008) 10 *Culture, Health and Sexuality* 73, 83.

²² Karolynn Siegel and others, ‘The Strategies of Heterosexuals from Large Metropolitan Areas for Assessing the Risks of Exposure to HIV or Other Sexually Transmitted Infections from Partners Met Online’ (2017) 31 *AIDS Patient Care and STDs* 182.

Grimm and Schwartz, in their investigation into gay men's perceptions of PrEP usage, noted a similar use of the "red flag" expression by a participant who felt that disclosure of PrEP usage was itself a "red flag" for having STDs and being more likely to have "risky sex."²³ Whilst, for the participant above, non-disclosure acted as a red flag for other practices which were risky, other instances of similar "red flag" type observations included instances where profiles disclosed an undetectable viral load: "No strings hook ups, sex only, bareback implied as undetectable".²⁴ Again, this account of perceived risk incorporates assumptions about the behavioural practices of people living with HIV. The participant's assertion that disclosure of an undetectable viral load in this context indicates a preference for "bareback" sex concurs with findings elsewhere that suggest both HIV+ and HIV- men understand the disclosure of some information, such as sexual preferences, as implicitly disclosing other information, particularly HIV status,²⁵ in what Race has described as '*veiled disclosure*'.²⁶

As I have discussed elsewhere,²⁷ the design of mobile dating applications is extensively governed by content restrictions. Some of these content restrictions limit or prohibit the discussion of sexual practices, such as bareback sex,²⁸ within profiles. Both intentional *veiled disclosure* and (intentional and unintentional) red

²³ Joseph Schwartz and Josh Grimm, 'Stigma Communication Surrounding PrEP: The Experiences of A Sample of Men Who Have Sex With Men' (2019) 34 *Health Communication* 84, 87.

²⁴ Participant 401353-401344-40473816

²⁵ See, for instance, O'Leary (n 20) 125–126; Barry D Adam and others, 'Silence, Assent and HIV Risk' (2008) 10 *Culture, Health and Sexuality* 759, 764–766.

²⁶ Kane Race, "'Party and Play": Online Hook-up Devices and the Emergence of PNP Practices among Gay Men' (2015) 18 *Sexualities* 253, 262.

²⁷ Cameron Giles, 'Digital Disclosure: HIV Status, Mobile Dating Application Design and Legal Responsibility' [2020] *Information and Communications Technology Law*.

²⁸ Chris Ashford, 'Bareback, Grindr and a New Censorship?' (*Law and Sexuality*, 5 June 2016) <<https://lawandsexuality.wordpress.com/2016/06/05/bareback-grindr-and-a-new-censorship/>> accessed 26 August 2019.

flags, may be interpreted as a response by application users to these restrictions. As bareback sex cannot be openly discussed within profiles, disclosure of an undetectable viral load (which is an alternative to condom use as a safer sex practice) may be read as synonymous with condom cessation, as it is in the following excerpt:

“The users HIV status tells you it is "undetectable" which may ring alarm bells amongst other users on the app because they may not be interested in meeting the person until they get checked next time around.”²⁹

4.2.2 Risk as a Label

The extent to which people living with HIV are, generally, constructed as *the* site of risk within a sexual health context is notable among many of the responses. In the accounts above, undetectable acts as a red flag despite the risk reduction that an undetectable viral load represents. Similarly, the participant’s focus on waiting until the *next* time viral load is tested places an emphasis on the potential that someone with an undetectable viral load might become infectious to others.³⁰ Both also exemplify how the label “undetectable” might be constructed as a sub-category of HIV-positive identities, and therefore remain associated with the idea of risk, rather than an entirely new category.³¹

Although many participants’ accounts of risk focused on situations where a prospective partner was not aware of their HIV status, some participants did focus

²⁹ Participant 401353-401344-42164265

³⁰ Asha Persson, ‘Non/Infectious Corporealities: Tensions in the Biomedical Era of “HIV Normalisation”’ (2013) 35 *Sociology of Health and Illness* 1065.

³¹ Mark DM Davis and others, “HIV Is HIV to Me”: The Meaning of Treatment, Viral Load and Reinfection for Gay Men Living with HIV’ (2002) 4 *Health, Risk & Society* 31, 35–36; however, cf, Kane Race, ‘Speculative Pragmatism and Intimate Arrangements: Online Hook-up Devices in Gay Life’ (2015) 17 *Culture, Health and Sexuality* 496.

on the perceived risks of those who had been diagnosed as HIV+. This is unsurprising, considering the ‘notion of “risky people”’ in relation to sexual health, and particularly HIV, has long been observed in the gay community.³² As Weait has noted,³³ and as seen above, it is not necessary for someone to have been diagnosed as HIV+ for these narratives to be employed. But where HIV was disclosed in the mock profiles, participants often expressed particular concerns regarding the perceived riskiness they attached to the character in the scenario:

“If actually undetectable (i.e. HIV positive, but medicated so as to massively reduce transmission of HIV), it does not phase me at all. However, if I were to see that test date now (18/12/2018), I would be concerned that someone who is diagnosed as HIV positive had not been for a more recent check up (it subconsciously implies they may be inept at other things like taking their medication). It is also unclear what ‘Test History’ actually means, as it is not specifically “date on which you were last tested for HIV”.³⁴

In this instance, the participant’s concern that someone diagnosed with HIV might not adhere to the medication necessary to maintain an undetectable viral load is closely associated with their perceived failure to maintain a closer surveillance over their sexual health. This is despite the dates provided in the scenario being well within recognised medical guidelines.³⁵ Beliefs such as these carry with them the implicit assumption that people living with HIV are irresponsible with regards to their health, further othering them from the “responsible” sexual partner who scrutinises them.³⁶ Similarly, several participants expressed a concern that

³² Paul Flowers, Barbara Duncan and Jamie Frankis, ‘Community, Responsibility and Culpability: HIV Risk-Management amongst Scottish Gay Men’ (2000) 10 *Journal of Community and Applied Social Psychology* 285, 291.

³³ Weait, *Intimacy and Responsibility: The Criminalisation of HIV Transmission* (n 18) 122–123.

³⁴ Participant 401353-401344-42164625

³⁵ UNAIDS, ‘The Need for Routine Viral Load Testing’ (UNAIDS/JC2846, Joint United Nation Programme on HIV/AIDS 2016), 5. World Health Organisation guidelines suggest testing can be done annually once an undetectable viral load is achieved, the date in the scenario was also within the six month time frame adopted by other organisations.

³⁶ Dion Kagan, “Re-Crisis”: Barebacking, Sex Panic and the Logic of Epidemic’ (2015) 18 *Sexualities* 817.

where HIV was disclosed in the profile this indicated that the user was “[n]ot good at prevention”.³⁷

For some participants, these concerns around risk were developed from a perception of HIV closely associated with promiscuity and risk taking:

“He’s been going around quite a bit, maybe lieing about his age (26/27) and had an awful amount of partners, where he got infected by HIV.”³⁸

In this excerpt, the participant draws a clear link between HIV status and the number of sexual partners that they expect the character to have had. Here, again, the othering of people living with HIV draws heavily on aspects of the homonormative and respectable queer sex.³⁹ Promiscuity has long featured in the moral panic surrounding HIV/AIDS, particularly in inducing fear surrounding the link between promiscuity and “disease and death.”⁴⁰ Within this data, these associations were played out, alongside related concerns about the disclosure and non-disclosure of status:

- “His HIV status also indicates to me that he tends or has been more promiscuous than others on a very regular basis and who doesn't use condoms.”⁴¹
- “At least he’s honest... maybe he sleeps about unprotected or he got it because someone lied about theirs”⁴²

³⁷ Participant 401353-401344-41516378

³⁸ Participant 401353-401344-40187345

³⁹ See Chris Ashford, ‘Bareback Sex, Queer Legal Theory, and Evolving Socio-Legal Contexts’ (2015) 18 *Sexualities* 195; and, also, Jody Ahlm, ‘Respectable Promiscuity: Digital Cruising in an Era of Queer Liberalism’ (2017) 20 *Sexualities* 364; Weait, *Intimacy and Responsibility: The Criminalisation of HIV Transmission* (n 18) 143–145; and, for general discussion of the privileging of ‘good’ forms of sexuality, Charlotta Carlström, ‘BDSM – the Antithesis of Good Swedish Sex?’ (2019) 22 *Sexualities* 1164.

⁴⁰ Gayle S Rubin, ‘Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality’, *From Gender to Sexuality* (1984) 164; and, also, Octavio Gonzalez, ‘Tracking The Bugchaser’ (2010) 75 *Cultural Critique* 82, 105.

⁴¹ Participant 401353-401344-40688721

⁴² Participant 401353-401344-41742865

Other participants suggested that disclosure of a positive status was itself an indication that the user was looking for “riskier” forms of sex:

“I didn’t notice this. I would immediately avoid him. It tells you he practices unsafe sex with strangers”⁴³

It is notable that within this account, the participant calls on both the overarching issue of promiscuity but also the idea of the stranger as the source of the risk in the situation. As Sharpe points out, it is our inability to determine whether the stranger is friend or foe which causes them to be conceived of as a source of risk.⁴⁴ Here the stranger acts not only as the source of infection for the character in the scenario but also the possible risk that the participant feels exposed to themselves and allows them to further distance themselves from the disrespectable risky Other, discussed in Chapter 2. The *stranger*, as discussed by Bauman, can be understood as one form of the Other, one which is less visible or identifiable but still looming and threatening.⁴⁵ Much like Bauman’s discussion of the *stranger*, the stranger conceived of by the participant here is “socially distant and yet physically close”,⁴⁶ only the physical proximity is achieved through indirect contact, through the sexual partner.

However, it is worth highlighting that not all participants constructed people living with HIV as inherently risky, nor were all seen as inherently likely to be promiscuous. Some participants went so far as to recognise the significant role of chance and luck that transmission or non-transmission of HIV involves:

⁴³ Participant 401353-401344-41625219

⁴⁴ Andrew N Sharpe, *Foucault’s Monsters and the Challenge of Law* (Routledge 2010) 26–27.

⁴⁵ Vince Marotta, ‘Zygmunt Bauman: Order, Strangerhood and Freedom’ (2002) 70 Thesis Eleven 36.

⁴⁶ Zygmunt Bauman, *Postmodern Ethics* (Blackwell 1993) 153.

“HIV+ so has probably been both unlucky and stupid, but is undetectable so has taken steps to reduce the harm to himself and others to effectively zero.”⁴⁷

By emphasising that the character in the scenario was perceived to be *both* “unlucky and stupid” the participant addresses not only the element of chance (or what might, if a more neutral definition were adopted, be labelled risk) but also the continued role of individual responsibility that is then exemplified by the participants’ account of treatment as prevention.

Statements such as these highlight the extent to which HIV status is utilised as a marker of risk in the accounts of participants, but a marker which is closely associated with the principle of individual responsibility. The participant above discusses how the character in the scenario is seen as taking responsibility for themselves but also, critically, for their sexual partners, by seeking treatment. Guta et al highlight how a HIV diagnosis is the beginning of a process of ongoing surveillance and management of viral load, with a particular focus on achieving the success marker of an undetectable viral load.⁴⁸ They also highlight how this subjects HIV+ men to increased pressure to maintain this marker of health and to increased shame where this is not achieved.⁴⁹

The data discussed above highlights how risk plays an important role in the narratives of participants in justifying the culture of surveillance and scrutiny facilitated by mobile dating application profiles. This can lead to HIV+ men being constructed as an absolute source of risk, a risk either through their (detectable)

⁴⁷ Participant 401353-401344-41613134.

⁴⁸ Adrian Guta, Stuart J Murray and Marilou Gagnon, ‘HIV, Viral Suppression and New Technologies of Surveillance and Control’ (2016) 22 *Body & Society* 82, 89.

⁴⁹ Guta, Murray and Gagnon (n 48) 99–100.

viral load, through perceived risk of failure to maintain an undetectable viral load, or thought of otherwise as being a “risky person” generally:

“The status to me shows that's he's unsafe and takes risks. It doesn't bother me to much that he has it but if he takes risks then that could put me off. Putting the date on when he last got tests is a good idea.”⁵⁰

The unknown also played a significant role as a sub-theme within participants' accounts of risk and sexual health on dating applications. This was closely linked with an emphasis on taking responsibility and taking control of one's own sexual health and the perceived inability to do so when not having the adequate information to do so. To the extent that participants reflected on the uncertainty that the characters in the scenarios might themselves experience, it was often suggested that disclosure within profiles was under- or uninformed. Where no HIV status was listed, it was often assumed that the profile's creator “probably doesn't know himself”.⁵¹ Furthermore, where a profile was perceived as “risky”, disclosure of a HIV-negative status was sometimes doubted: “[t]hey've just put negative but really have no idea probably”.⁵² Such assumptions were often incorporated into broader concerns that such risk was posed *by* those individuals to others:

- “I would assume that they do not know their status or are assuming that it is clear. They would be a high risk sexual partner who is potentially unsure of themselves and perhaps liable to risk their health or others in their habits.”⁵³
- “I always think blank HIV status generally equates to a person not knowing thier status. - I don't think this means I can tell a person has good or bad sexual health but it may suggest they are more risky in thier sexual behavoirsb”⁵⁴

⁵⁰ Participant 401353-401344-42326141.

⁵¹ Participant 401353-401344-41483556.

⁵² Participant 401353-401344-40167755.

⁵³ Participant 401353-401344-42316129.

⁵⁴ Participant 401353-401344-40164814

Such observations about who was *at risk* and who was a *source* of risk were often centred on the inability of those who had little reason to suspect they were potentially at risk to take control of the risky situation:

“I think this is because there is something to hide, or they are not testing and do not know their status! This indicates danger to me in terms of their risk to passing on sexual infections, if they don’t know, how am I to know? I can’t make an informed sexual health decision based on the limited information provided. So I must to assume otherwise or asked hum sexual health questions to get the answers, but then they could be lies.... or they could just tell me what they want me to hear. It still very much bothers me that they choose not to disclose!”⁵⁵

As Race has highlighted, the legal construction of the HIV-negative sexual partner in law often sees them positioned as the unassuming, unsuspecting sexual actor, with little reason to question the sexual health of their sexual partners and bearing little responsibility for preventing HIV transmission.⁵⁶ In the example above, the risk that a prospective sexual partner is not fully informed about their own sexual health is reframed through the impact that it might have on the participant who finds themselves unable to make “an informed sexual health decision”. As noted in Chapter 2, in *Konzani*, the defendant’s culpability and blameworthiness were closely linked to his knowledge, or expected knowledge, of HIV transmission risk when compared to the complainants.⁵⁷ Similarly, where non-disclosure is demonstrated in application profiles, this may be used to evidence the defendant’s (moral, if not legal) culpability through his withholding of this information from “unsuspecting” partners. However, where these partners have actively engaged with the sexual health section of application

⁵⁵ Participant 401353-401344-41722354

⁵⁶ Kane Race, ‘Framing Responsibility: HIV, Biomedical Prevention, and the Performativity of the Law’ (2012) 9 *Journal of Bioethical Inquiry* 327, 331.

⁵⁷ Weait, *Intimacy and Responsibility: The Criminalisation of HIV Transmission* (n 18) 43–45.

profiles this is arguably indicative of a state other than “unassuming” or unaware of risk, even if not fully informed.

This discussion highlights the important role that control over sexual health plays in the narratives of participants in two respects. Firstly, the participant discusses the lack of control they feel over the situation owing to the non-disclosure of any sexual health information; this lack of control is exemplified by their perception that they are working with *limited* information – something they cannot directly be responsible for. Secondly, in the latter half of the excerpt the participant discusses several ways through which they might attempt to take control of the situation, either by making further assumptions about the sexual health of the other; by asking the other about it and (notably) by further questioning or doubting the response to these questions; and finally, by maintaining the awareness of sexual health which they perceive the character to be lacking in. One other key method which participants discussed in the context of taking control of (perceived) risk, which will be returned to below, was avoidance:

“I wouldn’t want to have sex with them even if they were my type and I was there. They seem to want some risky things and are not too fussed about who with, and they are shady about their sexual health. No thanks, they probably have something even if they might be ignorant of it.”⁵⁸

These conceptions of risk, particularly the risk from the unknown and the risk specifically from people (knowingly) living with HIV play an important role in shaping the perceived distribution of responsibility for ensuring “safer sex” and preventing HIV transmission. The imbalance of responsibility to disclose, discuss risk taking and ensure sex is “safe” onto the shoulders of people living with HIV

⁵⁸ Participant 401353-401344-42096316

is closely associated with HIV-negative normativity.⁵⁹ The othering of, particularly, people living with HIV, is notable considering the extent to which the current legal framework has an *effective* duty of disclosure,⁶⁰ as will be discussed in Chapter 6.

4.2.3 Responding to Risk

What the excerpts in the previous section also exemplify is the critical role that uncertainty and the unknown have in shaping perceptions of risk. For a number of participants, silence was not only a red flag because of the extent to which it might indicate someone knowing their HIV+ status, in the manner noted by O’Leary,⁶¹ but because it suggested that the user was unaware of their status themselves:

“They may have left this blank to hide their status, or because they don't feel the need to share the date of their last check up or because they have limited knowledge of sexual health. They may be the type of person to only seek testing if symptoms are apparent, as opposed to regular checkups.”⁶²

Many participants similarly emphasised a concern that prospective sexual partners might be less well informed about sexual health issues, resulting in greater risks because of reduced rates of testing:

“As above, would expect that they are either not particularly clued up on the issue of HIV, don't know their status, or just don't care to disclose. Even straight people these days get tested (mostly a little bit... not enough) so I would honestly presume that this person has been tested at some point in their life, could be wrong though.”⁶³

⁵⁹ For, now somewhat historic, discussion of this, see Anthony PM Coxon, *Between The Sheets* (Cassell 1996) 166, among others.

⁶⁰ Samantha Ryan, “‘Active Deception’ v Non-Disclosure: HIV Transmission, Non-Fatal Offences and Criminal Responsibility’ [2019] Criminal Law Review 4.

⁶¹ O’Leary (n 20).

⁶² Participant 401353-401344-41613134

⁶³ Participant 401353-401344-42790768

As Lee and Sheon have noted, maintaining a regular routine of HIV testing has been relied upon by many who use testing services as an opportunity to reframe risk taking behaviour and present ‘themselves as responsible rather than being labelled “at risk”.’⁶⁴ It is also notable that the participant above highlights the mundanity surrounding testing and the normalcy of testing itself, *even* among heterosexuals. Arguably this reflects the continuing evolution of HIV risk narratives, from the at-risk communities approach seen at the emergence of the epidemic to a more individualistic risk-incident based approach.⁶⁵ Although this individualistic focus does appear to be only partially effective at encouraging testing, as exemplified by the first participant’s account of some only seeking testing “if symptoms are apparent”, and the second participant’s belief that some heterosexual testing behaviour is “not enough”.

Many participants considered regular testing an important component of maintaining an awareness of one’s own sexual health. Further discussion of testing highlighted how the act of testing acted as a broader indicator of, to some participants, sexual responsibility:

- “I suspect this person may not test regularly, is probably unaware of their HIV status.”⁶⁶
- “they may not know, may be concealing something, may not be regularly tested”⁶⁷
- “It does raise concerns that this section is left blank as they are looking for hook-ups/NSA meets. It could be possible that this person does not get

⁶⁴ Seung Hee Lee and Nicolas Sheon, ‘Responsibility and Risk: Accounts of Reasons for Seeking an HIV Test’ (2008) 30 *Sociology of Health and Illness* 167, 178.

⁶⁵ Mary S Petty, ‘Social Responses to HIV: Fearing the Outlaw’ (2005) 2 *Sexuality Research and Social Policy* 76; Rayner KJ Tan, ‘Internalized Homophobia, HIV Knowledge, and HIV/AIDS Personal Responsibility Beliefs: Correlates of HIV/AIDS Discrimination among MSM in the Context of Institutionalized Stigma’ (2018) 66 *Journal of Homosexuality* 1082.

⁶⁶ Participant 401353-401344-43543939

⁶⁷ Participant 401353-401344-42907661

tested often, if at all. Therefore, they are unaware of any STI's they could potentially carry.”⁶⁸

Comments such as these highlight how for some participants, testing was conceived of as a way by which a prospective partner could demonstrate that they were not an unaware “carrier” of a sexually transmitted infection. The construction of sexually active gay men as “carriers” of sexually transmitted infections has been noted by many and goes hand in hand with the idea that gay men and their *bisexual partners* act as “vectors” of infection,⁶⁹ as discussed in Chapter 2.

In her study into conceptualisations of risk and responsibility by men who have sex with men in the North East of England, Young noted the effects that such narratives can have on the distribution of responsibility for preventing HIV infection.⁷⁰ Similarly, where participants in this project discuss the role of prospective sexual partners as unwitting carriers of sexually transmitted infections, that conceptualisation draws on a dichotomy of responsibility/irresponsibility where testing acts as the mechanism by which one can take control and take responsibility for one’s sexual health by testing and minimising risk as a result. Similarly, where participants discussed believing that the character in some of the vignettes “[didn’t] take his sexual health seriously”⁷¹ or was “[l]ooking for fun, careless about infection risks”,⁷² the irresponsibility and

⁶⁸ Participant 401353-401344-41483556

⁶⁹ See, for instance, Heather Worth, Cindy Patton and Diane Goldstein, ‘Reckless Vectors: The Infecting “Other” in HIV/AIDS Law’ (2005) 2 *Sexuality Research and Social Policy* 3; Kagan (n 36) 825.

⁷⁰ Ingrid Kristine Young, ‘Reimagining Risk: Exploring Understandings of Risk in Sexual Health amongst Gay and Bisexual Men in the North East of England’ (PhD Thesis, Newcastle University 2011), Ch 5, in particular, 162-163.

⁷¹ Participant 401353-401344-40167755

⁷² Participant 401353-401344-42901967

perceived risk that these participants focus on was related not to promiscuity per se, but rather from the risk of the unknown not being confronted through testing.

Furthermore, these excerpts again demonstrate that participants' accounts of risk are often driven by specific markers, or lack thereof, within application profiles. The anonymity afforded by applications continues to be a source of risk, as was the case in earlier accounts of risk associated with the anonymity afforded by online dating websites.⁷³ It is important to note that this data does not suggest that estimations of risk are presumed to be absolutely accurate, as exemplified by the participant above who directly acknowledges the possibility that they "could be wrong". Similar accounts stressed that whilst absolute judgements about risk are less common, application users do tend to draw some assumptions where profiles: "[seem] to show that [the character who created the profile] may be less clued up about sexual health".⁷⁴

4.2.4 The Chronology of Risk

In this section, I have demonstrated the various conceptualisations of risk discussed by participants in response to the visual stimuli introduced in Chapter 2. Although there was significant variation about what constituted a risk and what did not – most notably between those participants who positioned people living with HIV as inherently risky and those who did not – what these accounts consistently demonstrate is the spatiotemporal scale seen in the conceptualisation of HIV transmission risk. This sense of scale can be thought of

⁷³ Mark Davis and others, 'Sex and the Internet: Gay Men, Risk Reduction and Serostatus' (2006) 8 Culture, Health & Sexuality 2.

⁷⁴ Participant 401353-401344-40545646

as a chronology, beginning when a risk (or perceived risk) is encountered and progressing through to the risk's eventual realisation or non-realisation.

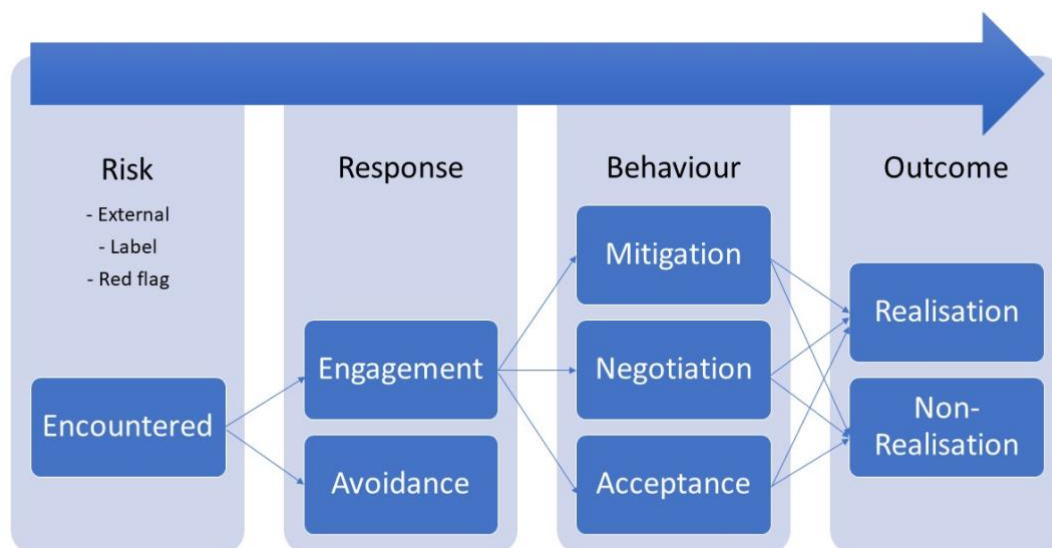


Figure 6: The Chronology of Risk

The externalising of risk seen in the use of markers such as the “red flag” and attempts to navigate around risk by labelling other people as “risky”, as well as attempts to resolve risk through the use of HIV testing and negotiations with prospective sexual partners, all exemplify how risk plays out, at an individual level, with a marked chronology. What stands out in these accounts is how risk is always dependent upon some external, embodied,⁷⁵ source of risk which is encountered. In this respect, risk is always part of a chronological narrative of cause to effect (or non-effect if the risk does not come to pass) as risks are accepted, avoided, or mitigated.

⁷⁵ As Weait notes, HIV risk is only ever embodied: Weait, *Intimacy and Responsibility: The Criminalisation of HIV Transmission* (n 18) 129.

As Van Doorn argues, there is a significant range of scales seen in the biopolitics of HIV, stretching from population level statistics down to the role of risk at a cellular level as seen in the discourses surrounding PrEP and TasP.⁷⁶ However, when operating at an individual level, risks inherently rely on a chronological narrative which stands in marked contrast to conceptualisations of safety which, as I will discuss in the next section, are quite cyclical in nature.

4.3 Safety

Closely related to discussion of risk, the second theme developed from the data related to conceptualisations of safety and what it means to have “safe sex”. In contrast to the marked linearity of risk, these accounts suggest that safety is conceptually cyclical. That is, in order for safety to be enacted, it presupposes a repeating routine to which the responsible sexual actor is committed. Despite the variation in the meaning ascribed to safety, *being safe* was often discussed as being essential by participants and safety conceived of as desirable when using dating applications, leading to the avoidance behaviours discussed later in this chapter.

The discussion of safety in absolute terms by some participants reflects perhaps the limitations imposed by the design of dating applications and the impact of a history of public health safer sex messaging which has been, generally, monolithic in nature. Of course, safer sex has never been monolithic in nature in practice.⁷⁷ However, the development of new technologies, most notably in the

⁷⁶ van Doorn (n 17) 906–917.

⁷⁷ Susan Kippax and Kane Race, ‘Sustaining Safe Practice: Twenty Years On’ (2003) 57 *Social Science and Medicine* 1, in particular at p.6.

form of PrEP, have further diversified the meaning of safety both in individual accounts of gay men and in the wider medicalised understanding of the term.⁷⁸ Nevertheless, many participants did discuss their impression of the safety of the characters in the profiles in relatively absolute terms:

- “They practice safe sex”⁷⁹
- “It tells you that they are a safe couple and regularly get tested. Which is comforting.”⁸⁰
- “That they are both HIV negative, are regularly tested (even though the test history may only be with ref to one of them), probably not on PREP though and I would expect them to be looking for sex safe only (with condoms).”⁸¹

It is notable that these accounts all focus on the third stimuli: “Couple”.⁸² Whilst these participants do utilise safety as a singular concept, it is the second participant’s emphasis that they are a “safe *couple*” which suggests a less uniform practice of being “safe”. Maintaining safety in sexual contact outside of a relationship – negotiated safety – has long been adopted by some gay men as a HIV prevention strategy which allows for condom cessation within the confines of the “safety” of the relationship.⁸³ Here, the focus on safety as something which is

⁷⁸ Andrew Spieldenner, ‘PrEP Whores and HIV Prevention: The Queer Communication of HIV Pre-Exposure Prophylaxis (PrEP)’ (2016) 63 *Journal of Homosexuality* 1685, 1693–1694; Iain Williamson and others, “‘There’s This Glorious Pill’: Gay and Bisexual Men in the English Midlands Navigate Risk Responsibility and Pre-Exposure Prophylaxis’ (2019) 29 *Critical Public Health* 560, 566–567.

⁷⁹ Participant 401353-401344-41625219

⁸⁰ Participant 401353-401344-42121132

⁸¹ Participant 401353-401344-42790768

⁸² See Section 3.4.3, above.

⁸³ See, for instance, Kippax and Race (n 77) 3; Timothy Frasca, Gary W Dowsett and Alex Carballo-Diéguez, ‘The Ethics of Barebacking: Implications of Gay Men’s Concepts of Right and Wrong in the Context of HIV’ (2013) 25 *International Journal of Sexual Health* 198, 209; Brandon Andrew Robinson, ‘Barebacking with Weber: Re-Enchanting the Rational Sexual Order’ (2014) 12 *Social Theory & Health* 235, 237.

achieved by the couple as a unit speaks to the importance of safety in accounts of condom cessation and other forms of risk taking.

Eisenberg et al, drawing on empirical data collected from young men who have sex with men, highlighted the importance of the concept of safety to instances of condom cessation in relationships. Safer sex was conceptualised by participants there 'as a necessary behaviour that [the participants] and other [young men who have sex with men] should engage in to protect against HIV and other STIs.'⁸⁴ However, despite the (at the time) continued monolithic emphasis of condom use within public health safe sex discourses, condom cessation was discussed within social contracts which established trust between sexual partners, such as relationships.⁸⁵ Such social contracts might be seen as a demonstration of the link between conceptions of safety, such as the ones discussed by the participants above, and the related concept of control.

As noted above, testing was employed by some participants as a means of navigating risk taking. However, the emphasis on regular testing seen in the excerpts above suggests that, additionally, testing exemplifies the routine nature of safety. Regular testing, like daily PreP doses,⁸⁶ and using a condom every time,⁸⁷ employs a cyclical chronotope. This chronotope of safety might best be conceptualised as a "living present", 'stretching between past and future'.⁸⁸

⁸⁴ Anna Eisenberg and others, 'Achieving Safety: Safer Sex, Communication, and Desire among Young Gay Men' (2011) 26 *Journal of Adolescent Research* 645, 649.

⁸⁵ Eisenberg and others (n 84).

⁸⁶ Alexander Maine, 'Bareback Sex, PrEP, National AIDS Trust v NHS England and the Reality of Gay Sex' [2019] *Sexualities*.

⁸⁷ David L Chambers, 'Gay Men, AIDS, and the Code of the Condom' (1994) 29 *Harvard Civil Rights-Civil Liberties Law Review* 353.

⁸⁸ Walker (n 9).

Testing, and other risk reduction behaviours, maintain this living present, because they are only ever sufficient to sustain, but never resolve or bring about the safety which is desired.⁸⁹

As highlighted in the excerpts above, condoms were seen as one, key, way through which individuals (or in this instance, the unit of the couple) could take control of their sexual health. In addition, some participants discussed the role of treatment as a means of lowering the viral load in order to reduce the risk posed to sexual partners:

“If he’s undetectable it means he’s managing his condition properly, and so long as also using contraception there is low risk to other partner”⁹⁰

Treatment as prevention challenges the traditional understanding of safe sex which emphasises the existence of a physical barrier preventing the transmission of bodily fluids between partners.⁹¹ Control also plays a different, although not non-existent, role in such accounts. Whilst condoms or negotiated safety rely upon a perceived social contract between sexual partners, involving the mutual participation in safe practices, this is not the case with TasP. With TasP, the virologic status of the HIV+ partner determines which acts are understood as “safe”, with control of this safety resting with the HIV+ partner.

Related to this was the importance of understanding the means of HIV transmission, and means of risk reduction, in the accounts of safety that related to TasP. Awareness of TasP as reported through a *yes/no/other* awareness

⁸⁹ Moore and Valverde (n 3) 517.

⁹⁰ Participant 401353-401344-40196504

⁹¹ Adam H Bourne and Margaret A Robson, ‘Perceiving Risk and (Re)Constructing Safety: The Lived Experience of Having “safe” Sex’ (2009) 11 Health, Risk and Society 283, 284.

question at the end of the survey was high with 76% (n=77) of participants reporting previously being aware of TasP.⁹² Some of these participants drew on detailed medical understanding of viral loads when discussing TasP:

“They have been diagnosed as HIV positive, but are under treatment to bring their virus cell count down to below 40 and are now classed as undetectable which means they can not transmit the virus to anybody while on their medication. The test history tells me that they were last tested in September and that they were confirmed as undetectable, hence listing that they are undetectable.”⁹³

As this account exemplifies, TasP was seen by many participants as a means of someone diagnosed with HIV taking control and managing the condition. This particular participant draws on detailed medical knowledge regarding viral loads when discussing the perceived safety of TasP; however, this level of detail was less common among participants. Whilst many who did not go into this level of detail were, nevertheless, reassured by disclosure of a undetectable viral load, some participants expressed a degree of uncertainty regarding, in particular, the role of the test history section of profiles in such instances:

- “Undetectable suggests to me they are HIV+ and have an undetectable viral load. However, in light of that, I have no idea what the test history date might mean. Unless, he has misunderstood the meaning of the 'undetectable' in this context.”⁹⁴
- “As I previously mentioned this makes me think the person is HIV+ with an undetectable viral load (and thus I'd read this as being Treatment as Prevention as part of his safer sexual practices). I think the last test date in the instance of a HIV+ individual is harder to parse - is this their last viral load test or their last HIV test (date of seroconversion?). Either way - it seems to be fairly redundant information”.⁹⁵
- “I was wondering that on the last page! I think he is HIV+ but undetectable and therefore cannot pass the virus on (as far as I understand). But I don't quite understand why he needs a test to update. However, it might be that

⁹² 18% (n=18) reported not being aware, 7% (n=7) responded other. See further discussion of these responses, particularly the explanation of other responses, below. For all participants, a link to additional information about TasP and treatment was provided.

⁹³ Participant 401353-401344-41722354

⁹⁴ Participant 401353-401344-40163650

⁹⁵ Participant 401353-401344-43543939

he is having a general screening so checking for other STDs (herpes, gonorrhoea, etc)".⁹⁶

Such uncertainty is not only notable in light of the perception of PLWHIV as inherently risky, as discussed above, but also speaks to the seronormativity – the normative assumption that people are, by default, HIV negative – of dating applications.⁹⁷ There is some variation of the prescribed role of the testing date feature across different applications; however, participants often discussed the testing feature in one of three ways in this project: as indicative of character, as a feature of a given moment/encounter, or as a source of uncertainty.

The smallest of these categories were those participants who were openly uncertain regarding the purpose of the feature in their responses:

“My thoughts are this is someone who is HIV positive and has an undetectable viral load. Their test history suggests they keep an eye on their sexual health regularly. Though to what extent is anyone’s guess. As test can mean anything from a pee sample to full blood works.”⁹⁸

The uncertainty with which this participant addresses the test history feature is indicative of the variation in testing services both across the UK, and at a more local level where different providers may offer different packages of testing which incorporate a broader or narrower range of individual tests.⁹⁹ However, recognition of this uncertainty was less common across the data, where testing was seen predominantly as an indication either of sexual responsibility, leading

⁹⁶ Participant 401353-401344-41530858

⁹⁷ For additional discussion of the seronormative design of dating website, see Kane Race, ‘Click Here for HIV Status: Shifting Templates of Sexual Negotiation’ (2010) 3 *Emotion, Space and Society* 7.

⁹⁸ Participant 401353-401344-43004560

⁹⁹ Health and Social Care Committee, *Sexual Health: Fourteenth Report of Session 2017-2019* (2017-2019, HC 1419).

to further discussion of safety by participants, or as a necessity which gave incidental safety in a particular instance through acting as a symbolic “all clear”.

4.3.1 Safe Identities: Testing as Indicative of Character

Testing was considered important by nearly all participants in the project. Participants generally conceived of testing as a necessity in order for sexually active people to accurately know their status:

- “Tested but not active! And test history is very important”¹⁰⁰
- “I think people should know their status”¹⁰¹
- “Good to know when they lastvtested. This shows that they know their status.”¹⁰²

Various aspects of these excerpts are notable, including how testing is seen as necessary not only in response to a particular risk incident, but rather on a regular and routine basis in order to demonstrate that one is actively aware of their HIV status. The emphasis by the third participant quoted also highlights the extent to which trust plays an important role in regulating testing; it is insufficient for the user of a profile to “know” themselves what their virological status is, testing is needed in order for that belief to be established in fact in the participant’s account.

As already discussed, several participants highlighted a belief that the couple in the third mock profile were more likely to practice what they considered safe sex.

Testing played an important role in establishing this confidence:

¹⁰⁰ Participant 401353-401344-42091689

¹⁰¹ Participant 401353-401344-42813461

¹⁰² Participant 401353-401344-40160014

“[T]hey are negative, regular tested and either play safe or careful due to their relationship”.¹⁰³

Other respondents also highlighted how even where there may have been a risk taken in the past, testing was indicative both that transmission had not come to pass and that the risk had been relatively modest in any eventuality:

“That they both get checked up at same time and are clear. That they may of taken risks before but are pritty good as are negative”.¹⁰⁴

In these instances, and others throughout the data, HIV-negativity was often interpreted as an indicator that someone was consciously aware of their sexual health and could be considered a “safe” sexual partner. As one participant exemplified with the observation that a character was “[e]xtremely safe.”¹⁰⁵ Discussing the first of the two written scenarios (“Gonorrhoea”), another participant explained:

“I think Ben would update [his profile to reflect the recent test at which gonorrhoea was detected], and it would appear (to other users of the app) that he is negative. I know it only says 'HIV Status: Negative' however whenever I see this on an app, I think to myself "This guy must be responsible as he gets tested regularly, and of course he wouldn't sleep with me knowing he has something without telling me" - at least I hope.”¹⁰⁶

This excerpt highlights not only the extent to which HIV status is extrapolated upon to produce a broader impression of the sexual health of a prospective sexual partner, but also exemplifies a common trend across the data of interpreting a recent HIV test to be an indicator that testing is done on a regular basis and where necessary to ensure that testing is accurate.

¹⁰³ Participant 401353-401344-42907661

¹⁰⁴ Participant 401353-401344-42326141

¹⁰⁵ Participant 401353-401344-40192769 (emphasis added)

¹⁰⁶ Participant 401353-401344-40168692

It is notable that across many of these accounts, participants rarely discuss safety in absolute terms – even the participant above suggests that their impression is one of extreme, not absolute, safety. Safety, as such, cannot be reduced down to a range of behaviours which can be carried out in order to achieve the goal of safety, it is rather a means of navigating a realm of perceived risks.¹⁰⁷ Here, where participants’ accounts use the perception of safety as a characteristic of a prospective sexual partner, there is a clear link to trust as well, something which is perhaps less present in the final conceptualisation of testing history: the “all clear”.

4.3.2 Safety in the Moment: The “All Clear”

The “all clear” conceptualisation of testing differs from where testing is read as an indicator of sexual responsibility in that it is less concerned with overall sexual behaviours and is instead only concerned with sexual health in the moment. The “all clear” was predominantly mentioned in the gonorrhoea scenario as a rationale for the character not to update their profile to reflect a more recent test because that more recent test had returned something other than an “all clear” result:

“He has not had all clear”¹⁰⁸

And, similarly:

“Changing the date would imply his most recent ‘clean’ result was more recent than it is.”¹⁰⁹

¹⁰⁷ See Matthew Weait, ‘Unsafe Law: Health, Rights and the Legal Response to HIV’ (2013) 9 *International Journal of Law in Context* 535, 536; also, more generally, Kimberly Koester and others, ‘Risk, Safety and Sex among Male PrEP Users: Time for a New Understanding’ (2017) 19 *Culture, Health and Sexuality* 1301.

¹⁰⁸ Participant 401353-401344-40196504

¹⁰⁹ Participant 401353-401344-41613134

The “all clear” invokes a sense of safety and security which is clearly lacking in the estimation of these participants. Young discusses how, for her participants, the all clear acted as a means by which condoms could be dispensed with, as the possible risk of a hitherto unknown infection had been overcome.¹¹⁰ The use of the all clear by the second participant above also draws on elements of the “clean/dirty” binary which marks HIV- people as desirable and HIV+ people as undesirable and unattractive and has been observed widely among men who have sex with men.¹¹¹ As discussed below, safety was often constructed as an element of desirability, the “all clear” played a significant role in several accounts of desirability, most notably with the participant quoted below, for whom the “gold star” of an “all clear” from a medical professional served as a marker of desirability:

“Absolutely and I would respect some one discussing and would make me more inclined to trust them and potentially meeting up with them, preferably a date at the clap clinic with a pack lunch after once I had seen bens gold Star from the good doctor!”¹¹²

Given the variation in different testing packages across the NHS and other providers, the all clear conception of sexual health is perhaps the most problematic. It carries with it significant scope for miscommunication and misunderstanding and may very well lead to allegations of active deception or non-disclosure.¹¹³ Whilst some may understand the “all clear” as an indication that there is *no* risk and that a partner is *clear* of *all* infections, others using this term may recognise that the “all clear” is limited to a range of more common, and

¹¹⁰ Young (n 70) 124.

¹¹¹ Spieldenner (n 78) 1691–1692.

¹¹² Participant 401353-401344-42526627

¹¹³ For discussion of similar observations relating to disclosure of a ‘clean’ status, see Barry D Adam and others, ‘HIV Disclosure as Practice and Public Policy’ (2015) 25 Critical Public Health 386, 392.

perhaps more serious, infections typically tested for in the absence of symptoms. Furthermore, given the extent to which the “all clear” is dependent on no further exposure to risks in the time since the test (and before it taking into consideration the window period of different HIV tests), there is additional risk of miscommunication inherent in the absolutist nature of the all clear.

4.3.3 Safety Dissipating Over Time

In many of the responses discussed so far, there is a general emphasis that regular testing is important and necessary. For those participants who discussed testing as a general indicator in relation to sexual health,¹¹⁴ *regular* testing was seen to be indicative of the (sexual) responsibility of the tester and for those emphasising the importance of the “all clear” testing was key to obtaining the safety and security that the all clear facilitates. In both of these accounts the *regularity* of testing is central and, consequentially, as testing becomes less recent, the safety that it provides dissipates. This was noted by several participants and, whilst the exact length of time that a test carried weight for varied across the data, most participants discussed testing which was perceived to be older or dated carrying little weight at all:

“The fact that the last tested section is within 4 months of the current date I would not be overly alarmed, this could be due to a host of reasons, chief that he has not had sexual intercourse during that time and has not had cause to be retested. I would become concerned if the date were to be over 6 months and very weary if it were over 12”¹¹⁵

This particular participant stood out, owing to the specificity with which they address the time periods within which a test would be reassuring, not overly

¹¹⁴ See, for example, responses at footnotes 80-81 and 100-104.

¹¹⁵ Participant 401353-401344-42316129

alarming and then concerning. They were also one of the few participants who reflected on the reason for non-testing in a given time frame. All of the profiles which disclosed a test date included a test date which was (at the end of the data collection period) less than 12 months prior, often the recommended timeframe for repeat testing.¹¹⁶ Whilst most participants did not discuss specific time frames, some, nevertheless, highlighted that a newer test was more appealing than a more dated one:

“The users HIV status tells you it is "undetectable" which may ring alarm bells amongst other users on the app because they may not be interested in meeting the person until they get checked next time around.”¹¹⁷

Other participants' concerns regarding test history appeared to vary, to a greater or lesser degree, dependent upon HIV status. One participant, quoted above as saying that he “would be concerned that someone who is diagnosed as HIV positive had not been for a more recent check up (it subconsciously implies they may be inept at other things like taking their medication)”¹¹⁸ when discussing the first stimuli (Undetectable), went on to say, on the third question (The Couple):

“I don't think it really tells me anything other than that they did not have HIV on 30/9/2018. It does imply they get checked regularly as a couple, which is positive, but if I were to read this now (18/12/2018), i would hope to see a new check date fairly soon. Broadly speaking, I think these two men are sensible”¹¹⁹

The difference between the test history dates on these two images, 29 days, may go some way to explain the different levels of concern that the participant has for

¹¹⁶ Annual testing is generally recommended for those not considered to be 'at risk' of infection. However, there is no general consensus on what 'at risk' means in this context. See LM McDaid and others, 'Frequency of HIV Testing among Gay and Bisexual Men in the UK: Implications for HIV Prevention' (2016) 17 HIV Medicine 683, 684; see, also, P Flowers and others, 'Has Testing Been Normalized? An Analysis of Changes in Barriers to HIV Testing among Men Who Have Sex with Men between 2000 and 2010 in Scotland, UK' (2013) 14 HIV Medicine 92.

¹¹⁷ Participant 401353-401344-42164265

¹¹⁸ Participant 401353-401344-42164265

¹¹⁹ Participant 401353-401344-42164265

each situation. However, it should also be considered whether perhaps people living with HIV are being held to a higher standard of safety, with safety dissipating more over time, than the HIV- application user.

4.3.4 Safety as Desirable

The final sub-theme relating to safety was the extent to which safety was constructed as desirable by participants, both as a state (being safe) and as a behaviour (practicing “safe” sex). Many participants discussed how giving the impression of safety, through behaviours such as displaying a recent HIV test, might be seen as desirable by application users:

- “A more recent test date looks better to would be sexual partners. It implies the individual behind the profile cares about his sexual health.”¹²⁰
- “Letting people know that you get tested and only recently can be appealing to people. If he does meet up with people for sex, until he knows he's clear he should tell people about it even though it would put people off”¹²¹

These examples not only demonstrate two of the different conceptions of safety discussed above, the latter also demonstrates the converse, the undesirability of perceived risk.¹²² This response also highlights the role of disclosure in navigating risk and achieving safety, the participant arguing that despite the impact that it would have on desirability, disclosure should take place.

¹²⁰ Participant 401353-401344-43686850

¹²¹ Participant 401353-401344-42326141

¹²² It should be noted within the context of the scenario that the character being discussed has already received treatment for gonorrhoea and is intending to have sex with a condom before the follow-up test to confirm that the treatment has been effective.

Other participants discussed the impact that the desire for safety had on their own sexual practices; here, safe sex returned to a monolithic state, being something that was (for these participants) essential:

- “I don’t really give it a second thought with how many people don’t fill [the HIV section of application profiles] in, safe sex is a must but even so, it doesn’t irk me too much.”¹²³
- “I think people use undetectable to indicate there is no risk. But I think this is untrue. I understand there are different strains etc. I never trust the tested date to be honest. I am always safe.”¹²⁴

Other participants were less absolute in their attitudes and practices, instead highlighting how perceived risk would lead them to adopt safer practices: “If I met with them it would be safe fun only”.¹²⁵ This conception of safety often related to condom use, but also reflected other means of HIV prevention, such as selective sexual practices:

“Wouldn’t draw any conclusions, but a reasonable possibility that he’s never been tested exists. If we were to have sex it would probably be handjobs and oral only, if we ended up fucking I’d wear a condom. Also, I would ask him about it beforehand.”¹²⁶

Robinson highlights that where gay men shift away from “always safe” strategies of sexual behaviour, safety can be seen to be giving way to trust and intimacy.¹²⁷ In keeping with such an analysis, safety here can be seen as one means of achieving control. Condoms and other methods of preventing the transmission of fluids, such as avoiding penetrative sex, as seen with the excerpt above, give

¹²³ Participant 401353-401344-41991164

¹²⁴ Participant 401353-401344-42901967

¹²⁵ Participant 401353-401344-42091689

¹²⁶ Participant 401353-401344-40498377

¹²⁷ Brandon Andrew Robinson, ‘Doing Sexual Responsibility: HIV, Risk Discourses, Trust, and Gay Men Interacting Online’ (2018) 61 *Sociological Perspectives* 383.

men a sense of control by reducing the exposure of vulnerable sites within the body.¹²⁸ Relying on TasP provides less of this control, and relies more heavily on trust and belief in the act of disclosure:

- “I imagine Charlie would want to reassure himself what undetectable means. But that he would still want to get tested - Ari said nothing and so nothing he says or does can be relied upon, including any explanation that he is undetectable.”¹²⁹
- “If I used a condom I wouldnt be worried but still get my regular check ups. If not used a condom and he explained he's undetectable and explain s what that means that would ease my mind but will still get a check up as soon as I can.”¹³⁰

Drawing on the work of Rubin and Race, Kagan suggests that risk and safety can mirror elements of Rubin’s charmed circle with the terminology of the two enabling the distinction between different sexual actors on a similar hierarchy of risky to safe.¹³¹ Another way of framing this conception would be to consider a hierarchy between control and its absence. This is not to advocate that this approach is justifiable, nor that it signifies the fair distribution of responsibility for preventing infection. What the data here does demonstrate, is the desirability of control/safety/security in the accounts of application users. It is notable how, through their exclusive focus on HIV, there are significant limitations on the extent to which the actual risks that may exist in a sexual encounter can be communicated.¹³² The lack of space to highlight other sexual health concerns means that, despite the risks that may be posed to people living with HIV by other

¹²⁸ Weait, ‘Unsafe Law: Health, Rights and the Legal Response to HIV’ (n 107).

¹²⁹ Participant 401353-401344-40159734

¹³⁰ Participant 401353-401344-42326141

¹³¹ Kagan (n 36) 820.

¹³² Cameron Giles, ‘Digital Disclosure: HIV Status, Mobile Dating Application Design and Legal Responsibility’ [2020] Information and Communications Technology Law.

STIs, PLWHIV are, through the design of these feature, always conceived of as the source of risks, never the “at risk” population.¹³³

4.3.5 The Cycle of Safety

In this section, I have discussed participants’ accounts of safety and the meaning of safe(r) sex. I have suggested that safety, unlike risk, is understood as a cycle through which sexual actors maintain control over their sexual health through employing “safe sex” strategies each time they have sex, get tested routinely and regularly, and hold others to the same standards.¹³⁴

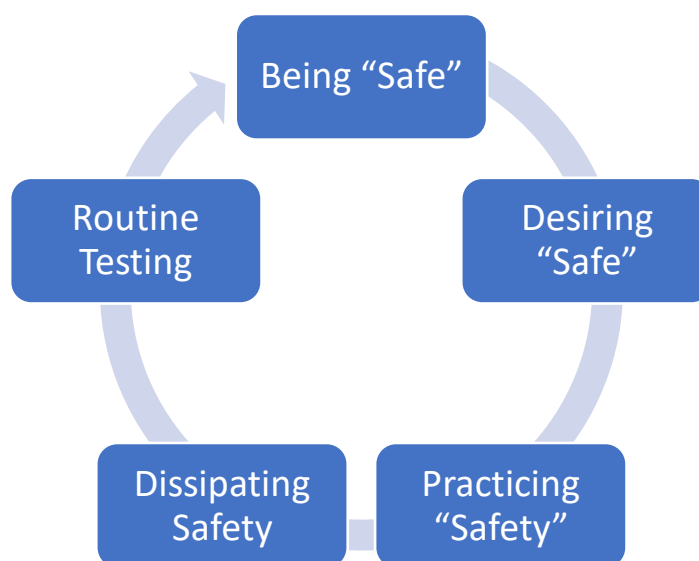


Figure 7: A Cycle of Safety

¹³³ See Ragan Fox, *Gays in (Cyber-) Space : Online Performances of Gay Identity* (VDM Verlag Dr Müller 2007) 164–165.

¹³⁴ van Doorn (n 17), endnote 24.

The cyclical nature of safety is best exemplified by the degradation of safety over time, as seen in the accounts above. This highlights how safety is, in these accounts, as much about participants 'feeling safe' as it is about reducing actual transmission risks.¹³⁵ Consequently, safety plays a significant role in the avoidance behaviours exemplified in several of the excerpts above, which I now turn to.

4.4 Avoidance and Stigma

Building on these conceptions of safety and risk, the next major theme in the data was the interrelationship between behaviours employed by participants in response to risk and associated attitudes expressed towards people living with HIV. Race¹³⁶ and Robinson¹³⁷ have both highlighted how online technology can be used by HIV+ and HIV- to avoid one another and establish boundaries on the basis of the binary status of being HIV positive or negative.¹³⁸ This is not a wholly, or even predominantly, online phenomenon; serosorting has long been employed as a personal strategy of HIV-negative people.¹³⁹ However, I would agree with Race and Robinson that online technologies offer a particularly exclusionary and stigmatising method of this kind of behaviour.¹⁴⁰

¹³⁵ Bourne and Robson (n 91).

¹³⁶ Race, 'Click Here for HIV Status: Shifting Templates of Sexual Negotiation' (n 97); Race, 'Speculative Pragmatism and Intimate Arrangements: Online Hook-up Devices in Gay Life' (n 31).

¹³⁷ Robinson (n 127).

¹³⁸ Of course, there are significant limitations on the effectiveness of this as a means of HIV prevention. See, in particular, Zablotska and others (n 20); and, Robinson (n 127) 395ff.

¹³⁹ Murphy et al discuss the sexual and social exclusion of PLWHIV on the basis of their HIV status in detail. See Patrick J Murphy et al, 'Serostatus Disclosure, Stigma Resistance, and Identity Management among HIV-Positive Gay Men in Ireland' (2016) 26 *Qualitative Health Research* 1459.

¹⁴⁰ Several of the points here were developed in Giles (n 27).

In this section, I discuss first the behaviours discussed by participants, including the extent to which this serosorting or sero-avoidance draws on perceptions of desirability and the implicit belief within some of these behaviours that people living with HIV *must* be aware that they are conceived of as less desirable by others. I then highlight how some participants drew on concepts of risk and safety to explain why these behaviours were adopted. Race suggests that such avoidant behaviours might be seen not primarily as prejudicial in nature; but as the product of ever-present concerns around safety, security and self-protection as enacted through digital innovations and an increasing degree of “seronormativity” within gay culture.¹⁴¹ Whilst not disagreeing with Race’s analysis, I would emphasise the role that stigma and prejudice do have in these behaviours, in particular, the extent to which some participants draw on discourses of infectibility and (ir)responsibility and employ “cautionary stigma” when interacting with PLWHIV.

4.4.1 Avoidance Behaviours

The responses by several participants drew on hierarchies of desirability which positioned people living with HIV as undesirable or unattractive on the basis of their HIV status:

- “To prevent people from being prejudice in thier choices, associated with guilt maybe or embarrassment. But it would have a clear impact on ‘attractiveness’”¹⁴²
- “Guys would probably not respond to him if they know he has HIV.”¹⁴³
- “It will put people off”¹⁴⁴

¹⁴¹ Race, ‘Click Here for HIV Status: Shifting Templates of Sexual Negotiation’ (n 97) 12–13.

¹⁴² Participant 401353-401344-42316129

¹⁴³ Participant 401353-401344-40187345

¹⁴⁴ Participant 401353-401344-43612383

Not only do all of these accounts suggest that HIV-positivity is perceived by many application users as an undesirable characteristic, it is also telling how people living with HIV are presumed to know and act on the basis that this is the case.

Another participant similarly highlighted:

“He knows people do not want to go with guys who has hiv regardless of being undetectable so he would hide it to have sex , I find it wrong him not being honest people should know if they are meeting him for sex”¹⁴⁵

Although for some participants, it was infectivity and the avoidance of risk which drove avoidance behaviours, this excerpt highlights how, for others, status alone was the driving force behind avoidance. Again, the suggestion that PLWHIV are acutely aware of this state of play is present in the participant’s account.

As Race has highlighted, these practices are built on a principle of seronormativity.¹⁴⁶ Other participants’ responses highlighted the impact of this seronormativity, notably within the context of a HIV+ character who did not disclose their status in the application profile:

“He is concerned guys he likes won't meet him if they know his actual status”¹⁴⁷

The emphasis on the character’s *actual* status is notable, because the profile did not list a status. Other responses were, similarly, based on the position that HIV-negativity was the default position. Adam et al note the important role that silence has in establishing normative values, including the extent to which “quick-sex environments” are further driven by a silence which may result in misunderstanding and miscommunication, particularly with regards to HIV

¹⁴⁵ Participant 401353-401344-41903701

¹⁴⁶ Race, ‘Click Here for HIV Status: Shifting Templates of Sexual Negotiation’ (n 97).

¹⁴⁷ Participant 401353-401344-42532460

status.¹⁴⁸ In online “quick sex” sites such as Adam4Adam, as Robinson highlights,¹⁴⁹ HIV disclosure features initially did not incorporate the capacity for silence and instead required the disclosure of some information in order for the profile to be created. In such circumstances, there might be additional capacity for silence to espouse a seronormative position where PLWHIV must actively disclose in order not to be (actively or passively) deceptive. However, where these features have always been optional, as is the case on mobile dating applications, the extent to which the attitudes of users can be explained through the development process is less clear. The role of participants’ own experiences and their knowledge of HIV statuses and transmission risks may also have a significant impact on these assumptions.

Discussing the first vignette (“Undetectable”), one participant suggested that a HIV+ status can be undesirable to some application users. However, they also suggested that an undetectable viral load was in some ways distinct to being HIV+, comparing it to having a less apparent or visible form of HIV:

“They may still have HIV but it is very hard to notice. They don't want to put others off”¹⁵⁰

Assumptions and knowledge such as this, which draw less on medicalised knowledge and more on expectations and observations, further underscore the extent to which the person living with HIV is understood as a *stranger*, hard to identify but a potential threat.¹⁵¹ This threat is compounded, rather than

¹⁴⁸ Adam and others (n 25) 769–770.

¹⁴⁹ Robinson (n 127).

¹⁵⁰ Participant 401353-401344-42535762

¹⁵¹ Marotta (n 45).

undermined, by seronormative expectations, which make the HIV+ Other an uncommon but dangerous threat to be avoided.

4.4.1.1. Other Behavioural Expectations Relating to HIV Status

Although many participants throughout the project considered HIV to be an undesirable characteristic in a prospective sexual partner and discussed general seroavoidance behaviours, often in absolute terms, others expressed a less specific and more dynamic set of behaviours when interacting with people living with HIV. For several, whilst HIV status might be off-putting upon initially meeting another on an application, they did not express the absolute exclusionary attitudes exemplified by others:

“Knowing their hiv status can put me off if I know right from the beginning but if I got to know them first before finding out it wonted bother me.”¹⁵²

Some participants felt that this set of beliefs was one explanation for why people living with HIV did not initially disclose their status within application profiles:

“The stigma prevents people from even talking to him, and so excluding it and mentioning it at a later date gives him more of a chance”¹⁵³

The stigma that the participant above alludes to was noted by the majority of participants and encompassed both application-centric behaviour and other offline behaviours. Below, I go into additional detail in respect of both of these points; however, for current purposes it is notable how behaviour which enacted this stigma continued to be justified, in particular the different avoidance attitudes expressed by some participants regarding relationships:

¹⁵² Participant 401353-401344-42326141

¹⁵³ Participant 401353-401344-42030243

“Sadly many would not respond or initiate conversation if status on profile. Understandable if seeking more than hook up”¹⁵⁴

This response highlights how HIV disclosure is understood differently dependent upon the context of the relationship between the discloser and the party to which they disclose. Whilst, in existing literature,¹⁵⁵ it has been observed that disclosure is less likely to take place within a casual sexual encounter, here the participant highlights how disclosure has additional consequences in the context of long-term relationship seeking. The implication, that HIV status acts as a barrier to long-term relationships, demonstrates how avoidance behaviour may differ dependent upon whether the perceived “risk” is seen as a one-off instance of a source of *ongoing* risk. This data is also significant as it suggests that whilst non-disclosure is anticipated by HIV-negative application users, many avoidance strategies assume that disclosure is taking place. This dissonance, between anticipated disclosure and acceptance that non-disclosure is understandable, may go some way to explaining perceived “dishonesty” in instances of non-disclosure.

As Race suggests, this kind of avoidance behaviour is most often interrelated with the desire of application users to feel safe and secure when using applications to facilitate sexual encounters. This was also notable where responses addressed the Gonorrhoea scenario; as noted above participants suggested a desire to see an “all clear” before they would feel comfortable coming

¹⁵⁴ Participant 401353-401344-40173030

¹⁵⁵ See, for example, Annette Bairan and others, ‘A Model of HIV Disclosure: Disclosure and Types of Social Relationships’ (2007) 19 *Journal of the American Academy of Nurse Practitioners* 242.

into sexual contact with the character. One participant, contemplating these avoidance behaviours, suggested that:

“people are not going to be inclined to sleep with someone who tells them they have a possibly antibiotic-resistant disease that could be spread (albeit greatly reduced chance with a condom, still why take a chance when the app is full of other available people too).”¹⁵⁶

The marketplace of sexual encounters that this participant alludes to plays an important role in facilitating the avoidance behaviours discussed here. Through the emphasis that these applications place on connecting to other *nearby* and *online* users, applications provide a regularly changing array of potential connections to their users.¹⁵⁷ The participant’s emphasis on the availability of others speaks to the extent to which users are able to adjust their own personal filters – including the technological filters on applications which users can easily broaden or narrow.¹⁵⁸

4.4.1.2 “Cautionary Stigma”

One final element of the avoidance behaviours discussed by participants that is particularly notable is the extent to which these behaviours are not affected by awareness of TasP or U=U. Certainly, many participants who were less informed about TasP explicitly discuss avoidance behaviours, one participant explained:

¹⁵⁶ Participant 401353-401344-41917008

¹⁵⁷ On the location-centricism of this marketplace, see, generally, Chad Van De Wiele and Stephanie Tom Tong, ‘Breaking Boundaries: The Uses & Gratifications of Grindr’ [2014] 2014 ACM International Joint Conference on Pervasive and Ubiquitous Computing 619; Samuel Hardman Taylor, Jevan Alexander Hutson and Tyler Richard Alicea, ‘Social Consequences of Grindr Use’, *Proceedings of the 2017 CHI Conference on Human Factors in Computing Systems - CHI ’17* (2017); Colin Fitzpatrick and Jeremy Birnholtz, “‘I Shut the Door’: Interactions, Tensions, and Negotiations from a Location-Based Social App’ (2018) 20 *New Media and Society* 2469.

¹⁵⁸ Kirsty Best and Sharon Delmege, ‘The Filtered Encounter: Online Dating and the Problem of Filtering through Excessive Information’ (2012) 22 *Social Semiotics* 237; RM Raymond M McKie, NJ Nathan J Lachowsky and Robin R RR Milhausen, ‘The Positive Impact of Technology on Young Gay Men’s Dating and Sexual Relationships in Canada: Results From a Focus Group Study’ (2015) 12 *Journal of LGBT Youth* 19.

“I lack knowledge on an 'undetectable' status, however it should always be communicated to potential sexual partners. I think he has not completed this as it would put most men off wanting to meet him.”¹⁵⁹

Again, in this account is the assumption not only that HIV acts as a discrediting characteristic but also that people living with HIV are acutely aware of this “fact” when choosing to disclose or not disclose in an application profile. However, what is notable is that when compared to participants who not only reported being aware of TasP, but who also discussed this in their responses, there were similar avoidance and personal-safety discourses, discussed in terms of “cautionary stigma”:

“The test history lets me know how recently they’ve been tested. I’d be questionable to those who haven’t had a test in about 4/5+ months. I’m happy and proud that he put his HIV status on there. Admittedly I still have a little bit of that *cautionary stigma* with it all so would take me a bit more of a conversation first about it all with the person. There are those who say they’re on ‘PReP’ therefore don’t need a condom. This really is infuriating as you can still catch other STIs and STDs.”¹⁶⁰

The “cautionary stigma” that this participant discusses was seen in several other responses, typically when discussing characters with undetectable viral loads. It was most often used to distinguish between people with undetectable viral loads and HIV negative people on the basis that there was a perceived risk with the former which warranted additional caution:

- “Useful to have but I would be cautious here as undetectable does not mean negative”¹⁶¹
- “He's open about it but I'm not sure whether he's actually undetectable. Might be a way of still getting laid.”¹⁶²

¹⁵⁹ Participant 401353-401344-42413617

¹⁶⁰ Participant 401353-401344-41514592 (emphasis added)

¹⁶¹ Participant 401353-401344-40166180

¹⁶² Participant 401353-401344-40187345

What is notable about this cautionary stigma is the extent to which the status of undetectable people as undetectable is specifically interrogated in a manner which the negative status of negative people is not. Whereas caution was noted in both instances, it is the role of this caution which might be used to distinguish between caution and cautionary stigma. Whilst many participants discussed not relying on disclosure and instead employing their own safety strategies (most prominently in the form of insisting upon condom use), cautionary stigma was specifically employed in order to question the truthfulness of PLWHIV and their disclosure. To this extent, the emphasis of cautionary stigma should not be upon the *caution* which it encompasses, but the extent to which it is a *stigmatising* practice.

4.4.2 Stigma

“Stigma on HIV and AIDS is a killer for users of apps”.¹⁶³

Discussion of stigma permeated the responses. Whereas avoidance behaviours were a potentially stigmatising practice picked up on throughout many of the responses, the broader negative attitudes towards people living with HIV that stigma encapsulates were less specific to the digital world of websites and applications. Facing stigma is certainly not an experience specific to people living with HIV; that being said, the nature and extent and intensity of HIV stigma may be unparalleled.¹⁶⁴ The stigma associated with HIV was, for some participants,

¹⁶³ Participant 401353-401344-40166180

¹⁶⁴ To borrow the language of Murphy et al, ‘HIV infection is simply unique in terms of the extent and degree of stigmatization associated with it’. See Murphy et al (n 139) 1469.

closely associated with the continued lack of understanding of HIV by many application users:

“Guys with HIV face stigma from other users, it is not widely accepted or understood by the app using community. Knowing Undetectable guys myself, they complain of finding their choices limited and having to rebuff bullying or victimisation in apps.”¹⁶⁵

Similarly, one participant, who disclosed being HIV positive in their response, highlighted the impact that stigma had on his own disclosure practices:

“As with me I believe it's a personal thing and even now there is to much bad feelings about guys with hiv So.i agree with him withholding that I Do.on a public page”¹⁶⁶

Given that HIV status is not a visible physical characteristic in the same way as certain disabilities, ethnicities and genders, (non-)disclosure plays a critical role in regulating the stigma that these participants discuss. In the second excerpt it is the concern that the participant has around being visible to a wider audience, potentially attracting the stigmatising behaviours discussed above, that at first highlights how HIV disclosure can be experienced as a discrediting moment.¹⁶⁷

The participant then goes on to explain the extent to which there is a general negative attitude directed towards people living with HIV on applications, revealing how this shapes his own disclosure practices leading him not to disclose on a public page. Miller notes how there is a distinction in how information which is freely given and information which ‘leaks out’ produce stigma.¹⁶⁸ Another participant went on to explain how they could understand non-disclosure in a

¹⁶⁵ Participant 401353-401344-40473816

¹⁶⁶ Participant 401353-401344-42531012

¹⁶⁷ Erving Goffman, *Stigma: Notes on the Management of Spoiled Identity* (Penguin 1963).

¹⁶⁸ Hugh Miller, ‘The Presentation of Self in Electronic Life: Goffman on the Internet’, *Embodied knowledge and virtual space conference* (1995).

publicly visible profile, owing to the impact that this might have on the character's offline life:

"I think he doesn't include his status as there is still so much stigma still attached to HIV & it would greatly reduce his chances of arranging casual sex and also meeting someone who he could form a long term relationship with. He also may not include it in case someone he knows/works with etc. sees & spreads it to people in his social/educational/employment circles - again due to the stigma this would be difficult for him."¹⁶⁹

As Ahlm has noted, the use of dating applications and the information on them can leak out into the offline lives of users.¹⁷⁰ The visibility which mobile dating applications utilise for networking, instant visibility to nearby users, gives users little control over who they can be seen by – the audience can only ever be imagined.¹⁷¹ Concerns such as those expressed above highlight how this imagined audience regulates what application users include in their profiles, including in the sexual health categories.

Several participants commented upon the stigmatising effect that the newer features designed to promote HIV disclosure might have. Most notably, several were critical of the test history section of profiles:

"Test history adds stigma to HIV sufferers by distinguishing those that have HIV and those that haven't. A culture is created whereby people that are HIV+ are seen as disgusting and wrong and a negative diagnoses is worn as a badge of honour"¹⁷²

and, similarly;

"Test history again just strikes me as weird and somewhat stigmatising".¹⁷³

¹⁶⁹ Participant 401353-401344-43683239

¹⁷⁰ Ahlm (n 39).

¹⁷¹ On mobile dating applications particularly, where users can never be certain whose filters they are being captured by and whose they are evading. For discussion of the imagined audience, generally, see Eden Litt, 'Knock, Knock. Who's There? The Imagined Audience' (2012) 56 *Journal of Broadcasting and Electronic Media* 330.

¹⁷² Participant 401353-401344-40159327

¹⁷³ Participant 401353-401344-42628211

Although the design of most applications means that, at present, users cannot filter out profiles that disclose HIV or on the basis of the test history date,¹⁷⁴ both of these features can be seen contributing to the hierarchies of desire associated with “safety”, as it is discussed above.¹⁷⁵ The “badge of honour” discussed by the participant above highlights the continued normative status of HIV-negativity and the extent to which HIV is singled out as *the* threat to health, safety, and desirability by mobile application design.¹⁷⁶

To conclude, the avoidance behaviours discussed by participants were strongly associated with the underlying stigma directed towards people living with HIV on mobile dating applications, as well as offline. The exclusive focus on HIV status taken by many dating applications positions it as the standout sexual health concern and targets responsibility for sexual health primarily onto the shoulders of PLWHIV or otherwise encourages segregation as a risk management approach. The next section discusses the role that emotion plays within this process; therefore, to end this section, I present an excerpt from a participant discussing their perception of the stigma that PLWHIV face:

“Disclosure of ones HIV Staus is still very taboo. I think people in general do not know what HIV Positive undetectable means. People hear/see a HIV Positive status and immediately panic and discriminate. Potential partners generally don’t want to take that risk by having sex with somebody who has the virus. It’s just too much for them take in. They are not

¹⁷⁴ Although features such as this do appear to have been considered in the past, see Daniel Reeders, ‘Digital Quarantine? Grindr Considers HIV Filter’ (*Bad Blood*, 6 July 2016) <<https://badblood.wordpress.com/2016/07/06/digital-quarantine-grindr-considers-hiv-filter/>> accessed 15 August 2016; Bobby Rae, ‘Is Grindr about to Introduce a HIV Filter?’ (*Pink News*, 11 July 2016) <<https://www.pinknews.co.uk/2016/07/11/is-grindr-about-to-introduce-a-hiv-filter/>> accessed 5 December 2019.

¹⁷⁵ Again, see Kagan (n 36).

¹⁷⁶ Race, ‘Click Here for HIV Status: Shifting Templates of Sexual Negotiation’ (n 97) 13; Robinson (n 127) 395.

equipment with the information to make a rationale decision about the risk. They assume they are at risk!”¹⁷⁷

4.5 Emotion

In the final section of this chapter, I intend to address a theme which appeared to underpin all of the themes discussed in this chapter: emotion. Emotion featured throughout the responses of many of the participants. However, one area where emotion featured heavily, and where this section focuses, was the final scenario and the non-disclosure featured in it. By exploring the two emotions which arose most prominently – fear and anger – and how these were employed by participants in their expectations towards HIV disclosure, I hope to demonstrate how the anxieties surrounding HIV are not resolved through disclosure, but instead frame the scrutiny of PLWHIV’s (non-)disclosure.

4.5.1 Fear

“But fear was what the plague produced copiously, till it now constitutes the substance of homosexual life.”¹⁷⁸

Fear was discussed both directly and indirectly by participants in response to a question concerning their expected reaction of a character who had not been informed of a partner’s undetectable viral load prior to sexual contact:

- “Prob not happy may panic.but then seek reassurance”¹⁷⁹
- “Scared as fuckk”¹⁸⁰

¹⁷⁷ Participant 401353-401344-41722354

¹⁷⁸ Andrew Holleran, *Ground Zero* (Morrow 1988) 25 (emphasis added).

¹⁷⁹ Participant 401353-401344-42531012

¹⁸⁰ Participant 401353-401344-42204861

- “Charlie may feel deceived and worry about his own health even if he knows what undetectable means”¹⁸¹

As these three quotations highlight, fear is closely related to the theme of risk discussed earlier in the chapter, along with a desire for safety which is demonstrated by the ways participants describe the actions they suspect the character may take. Fear highlights the extent to which risk and safety are part of a broader conceptualisation of individual control and individual self-determination which underpins participants’ accounts of disclosure and sexual responsibility, as will be addressed in the next two chapters.

Many participants discussed the character seeking out additional information, including medical advice, to partially allay the fear they described the character as having:

“I think Charlie would be shocked, scared and angry and would hopefully seek medical advice”¹⁸²

The “shock” that this excerpt highlights again demonstrates the seronormativity that can arise on dating applications. The surprise that the participant prescribes onto the character signals the extent to which silence is read as HIV-negativity.¹⁸³

It is also notable that the participant suggests the character would seek out medical advice. Not only does this suggest the expectation that application users are underinformed about sexual health issues, particularly those relating to HIV, it also speaks to the search for safety and security that application users appear to engage in. As exemplified by the third excerpt above, however, additional information about transmission risk in undetectable cases was often insufficiently

¹⁸¹ Participant 401353-401344-42837958

¹⁸² Participant 401353-401344-42413617

¹⁸³ Adam and others (n 25).

reassuring and many participants discussed characters seeking out testing to provide additional reassurance:

- “fear and worry as this has happened to me. so booked in for immediate test”¹⁸⁴
- “Upset, worry, check”¹⁸⁵
- “Annoyed angry upset, would think he needs to get tested ASAP”¹⁸⁶

Furedi suggests that the preoccupation with risk seen in modern society has resulted in a ‘culture of fear’ where the theoretical possibility of risk can give rise to fear even where the probability is negligibly low.¹⁸⁷ Even among those participants who understood the (non-)risks involved in sexual contact with somebody with an undetectable viral load; perceived risks and the fear of this risk continued to be present. What is important to note about fear is the extent to which negligible risk situations can still give rise to the stigmatising avoidance behaviours discussed above:

“I think he would most likely block him and not meet. There is a huge stigma related to hiv and people aren’t educated well enough about undetectability. There’s a major element about fear”.¹⁸⁸

Fear, particularly the fear of HIV/AIDS, can be seen shaping discourses around risk management, safety and, as will be discussed below, responsibility. Rubin highlights the impact that HIV has had on sexual ideology, in particular how it

¹⁸⁴ Participant 401353-401344-42907661

¹⁸⁵ Participant 401353-401344-41755731

¹⁸⁶ Participant 401353-401344-42091689

¹⁸⁷ Frank Furedi, *Culture of Fear* (Rev Edn, Continuum 2002), in particular, vii-ix. Furedi goes on to make some claims regarding the risks associated with HIV (in particular, at p 25-26) with which I disagree but which deserve more critical analysis than I am able to give here.

¹⁸⁸ Participant 401353-401344-43061371

frames the scrutiny of sexual actors.¹⁸⁹ In discussion of the number of recent “gender deception” cases, Alex Sharpe similarly highlights how the emotional responses of complainants in those cases framed discussion of sexual responsibility and consent, seen both in the popular press and within legal proceedings.¹⁹⁰ Similarly to those cases, it is important to discuss what the limitations of the impact of ‘complainant distress, disgust and revulsion’ should be.¹⁹¹

These excerpts highlight the important role that fear plays in framing the risk and safety themes discussed earlier. Fear of HIV is significant among men who have sex with men; as the quote from Holleran at the beginning of this section highlights, fear framed sexuality for this group long before the AIDS epidemic but was brought sharply into focus by it. Research into the impact of PrEP has highlighted its role in overcoming the undercurrent of fear associated with sexuality for some gay men.¹⁹² Fear can be seen shaping accounts of safety and, consequently, the attribution of responsibility for perceived breaches of that safety. Within many responses, the fear participants discussed was used to scrutinise the actions of the non-disclosing HIV character; however, some participants did reflect on the role of the other character in the scenario:

“[If the character would] be fine with Ari saying “oh I haven't tested for a year but I assume I'm negative”, it's hypocritical to cause a fuss with someone telling you they're undetectable and by definition without risk. of course, in the former case the chances are they aren't positive whereas in the latter case everything hinges on whether they're undetectable, so it

¹⁸⁹ Rubin (n 40) 164–165; see, also, Simon Watney, ‘AIDS, “Moral Panic” Theory and Homophobia’ in Chas Critcher (ed), *Critical Readings: Moral Panics and the Media* (Open University Press 2006).

¹⁹⁰ Alex Sharpe, ‘Criminalising Sexual Intimacy: Transgender Defendants and the Legal Construction of Non-Consent’ [2014] *Criminal Law Review* 207.

¹⁹¹ Sharpe, ‘Criminalising Sexual Intimacy: Transgender Defendants and the Legal Construction of Non-Consent’ (n 190) 221.

¹⁹² Koester and others (n 107).

heightens your anxiety. but [the character] should be just as if not more anxious in the former case too if he hadn't used condoms. basically: you never know who's lying to you, so take precautions, and don't project your understandable anxiety over STDs onto someone else.”¹⁹³

In contrast to other participants, who focused on the non-disclosure of Ari – the character with an undetectable viral load – this participant puts an emphasis on individual responsibility and risk reduction by Charlie – the other character in the scenario. Although they highlight the role that fear and anxiety plays in navigating sexual health issues, they position this more as a call to action on the part of HIV-individuals to ensure that they do not place themselves at risk. This response stood out among the data because it did not place responsibility for preventing transmission squarely on the shoulders of PLWHIV. It also reemphasises the role of control in accounts of risk and safety, in particular the self-control taken by the character by not relying on TasP (whether knowingly or unknowingly) or trust in others and instead taking control by holding oneself accountable.

Other participants similarly highlighted how fear could be avoided through individually taking steps to reduce or eliminate risk so that they could have confidence that HIV transmission would not take place:

“If it was me, I would not have a problem as I use prep but who knows how a person would react. There are lots of people who overreact”¹⁹⁴

Discussion of PrEP usage was generally limited, which is unsurprising as none of the stimuli images sought to elicit discussion of it specifically. However, given the extent to which PrEP has been discussed as reframing “safe(r) sex” and sexual responsibility, it is important to consider how PrEP alters the culture of risk

¹⁹³ Participant 401353-401344-14917008

¹⁹⁴ Participant 401353-401344-42322573

and safety seen with application users here.¹⁹⁵ PrEP can be seen as a tool for sexually active individuals to take individual control over risk and safety, without necessitating the disclosure by their sexual partners. However, in much of the media discussion of it, PrEP has been positioned as something used predominantly by gay men who are outside the bounds of “safe” homonormative models of gay life’, who are inherently risky and irresponsible in matters relating to that risk.¹⁹⁶

Such narratives of course ignore the role that PrEP plays in allaying the fear of risk and the desire for safety, seen in the accounts of participants here and elsewhere.¹⁹⁷ Drawing on Joshi¹⁹⁸ and Ashford,¹⁹⁹ Lovelock argues that conceptualisation of non-homonormative homosexuality ‘remain charged with associations of danger, threat, irresponsibility, excess, waste, destruction, and death.’²⁰⁰ It is similar accounts of the fear of danger, the irresponsible and risky PLWHIV here, that draw attention to the role of control and lack of control in the fear that participants here discuss.²⁰¹

It is notable how the design of mobile dating applications does little to reduce the fears that participants have surrounding HIV and sexual health more broadly:

“I agree there is no reason why a blank status is less worrismatic than an undetectable one. But it is. It’s on account of ignorance i know”²⁰²

¹⁹⁵ On the role of PrEP in discourse on safer sex, see generally, Spieldenner (n 78); Sharif Mowlabocus, “What a Skewed Sense of Values”: Discussing PreP in the British Press’ [2019] *Sexualities*.

¹⁹⁶ Michael Lovelock, ‘Sex, Death and Austerity: Resurgent Homophobia in the British Tabloid Press’ (2018) 35 *Critical Studies in Media Communication* 225, 226.

¹⁹⁷ Koester and others (n 107).

¹⁹⁸ Yuvraj Joshi, ‘Respectable Queerness’ (2012) 43 *Columbia Human Rights Law Review* 415.

¹⁹⁹ Ashford (n 39).

²⁰⁰ Lovelock (n 196) 236.

²⁰¹ Furedi (n 187) 68.

²⁰² Participant 401353-401344-41560481

Although the decision by application developers to incorporate sexual health information into the profiles of applications should be seen as a positive step, there are limitations and potentially negative consequences which should also be highlighted. Applications might be seen to be contributing to the culture of fear surrounding HIV and sexual health by reducing sexual responsibility to the act of disclosure. Not only does this reduce the extent to which application users might feel in control of issues of sexual health, it also undermines the impact of TasP and U=U by continuing to construct PLWHIV with undetectable viral loads as objects of fear.

Given the extent to which risk is closely associated with the unknown in the accounts of participants here, it is also notable how little can be said on the profiles of applications, something that was noted by several participants:

“I would be worried by this. I do not really understand the various HIV diagnoses and it is certainly an issue for me. It's hard to clarify these things on an app like this”²⁰³

Fear was certainly not the only emotion discussed by participants, participants also highlighted the significant mental health impact that application use as well as the continuing sense of judgement and rejection can have as well as some discussion of positive emotions such as enjoyment and pleasure. However, in discussion of HIV, fear was a unifying theme and closely related to the other prominent theme: anger.

²⁰³ Participant 401353-401344-41560581

4.5.2 Anger

Participants spoke of their expected reaction to instances of non-disclosure primarily, as seen above, in terms of fear. This fear can also be seen to be giving rise, however, to anger directed towards non-disclosing PLWHIV. One participant explained that the character would likely be angry specifically because “*he wasn’t told before*” the sexual encounter had taken place.²⁰⁴ Another participant emphasised how much they would similarly be angry towards a partner who had not disclosed their status: “He, as I would, would be angry and upset”.²⁰⁵

Accounts of anger within the data highlight the interrelationship between risk, safety and fear. In particular, several responses demonstrate how the fear of risk need not have a basis in the objective risk present in the scenario which is being discussed in order to give rise to anger:

“I think Charlie would be upset/feel betrayed/be angry at Ari. I think Charlie would be more likely to get a full STI screening as a result of the information, even though the chances of passing on HIV are slim to none he will still feel at risk & may think Ari it at risk of having other STIs which he could pass on.”²⁰⁶

In terms of the impact of non-disclosure, these excerpts highlight how instances of non-disclosure evoke an emotive reaction, which includes the anger and sense of “betrayal” that the participant here emphasises. The emotive response to non-disclosure should be noted, not only because of the role that anger and blame have in legitimising the present use of the criminal law as a response to HIV transmission,²⁰⁷ but also because of the additional weight that they may bring to

²⁰⁴ Participant 401353-401344-43612383 (emphasis added)

²⁰⁵ Participant 401353-401344-41625219

²⁰⁶ Participant 401353-401344-43683239

²⁰⁷ Matthew Weait, ‘Taking the Blame: Criminal Law, Social Responsibility and the Sexual Transmission of HIV’ (2001) 23 *Journal of Social Welfare and Family Law* 441; Alex Woody and

the expansion of the criminal law in this area. For instance, Yusef Azad of the National Aids Trust, among others, has highlighted how significant the impact of the emotions present in non-disclosure instances can be, potentially resulting in overzealous police involvement and investigations into non-disclosure.²⁰⁸

Of course, the distress of potential complainants should be taken seriously in such instances and support should be offered to them. But this need not involve legitimising the range of emotional responses to non-disclosure that might arise. The distinction between these two positions goes to the heart of the emotional responses seen here and the extent to which they are driven by the prioritisation of the perceived *right to know* over the right of PLWHIV to privacy:

“Charlie would be angry and upset that Ari had not disclosed and given him a choice before the meet. No doubt he would immediately test himself and fear the worst. Ari would delete/block the profile no doubt.”²⁰⁹

This account highlights how the anger that many participants directed towards a non-disclosing character was driven by the perceived breach of personal autonomy. Personal autonomy, as it is discussed here, links the perceived *right to know* with the consent-driven *right to choose*, legitimising the former with the legal weight of the latter. Similar to debate surrounding gender identity cases, discussed in Chapter 2, this sees the right to personal autonomy as absolute. Instead, it might be necessary to acknowledge, as Brooks and Thompson argue in respect of “sexual fraud” cases, ‘that in certain situations autonomy can be

others, ‘Motivations for Punishing Someone Who Violates HIV Nondisclosure Laws: Basic Research and Policy Implications’ (2015) 15 *Analyses of Social Issues and Public Policy* 127.

²⁰⁸ Emily Jay Nicholls and Marsha Rosengarten (eds), ‘Witness Seminar: The Criminalisation of HIV Transmission in the UK’, *Disentangling European HIV/AIDS Policies: Activism, Citizenship and Health (EUROPACH)* (2019), in particular, Azad at p.31, who highlights a case involving a highly distressed complainant, where a police investigation continued long after it was apparent there was no case to answer as one of the investigating officers felt that something needed to be done.

²⁰⁹ Participant 401353-401344-40473816

impacted, or not fully realised, without legal intervention, and indeed this may be *useful* to the lifelong development of autonomy competencies.²¹⁰

It is noteworthy that the participant quoted above also reported being aware of TasP and yet attributes fear to the character in the scenario. Again, this highlights how fears felt in the context of HIV disclosure can arise out of improbable or impossible eventualities and still be perceived to impact individual autonomy and agency. The emphasis that the participant places upon the HIV- character's choice was mirrored in other responses which prioritised the autonomy of HIV- characters over the privacy of HIV+ ones:

“I would expect Charlie to feel angry that he was not informed prior to the hookup so he could make an informed decision.”²¹¹

The claim, that the HIV- character has the right to the virological status of his partner in order to facilitate making an *informed* decision, positions HIV status disclosure as both relevant and necessary to the consent to sexual activity. This necessity seems to override any claim of the right to privacy that the character living with HIV might make. Similar responses show some of the ways that this dynamic is justified by participants as necessary in order to enable HIV-negative individuals to take additional steps to provide a sense of safety, such as using condoms.

Brooks and Thompson suggest that, generally, the courts' assessment of consent is obfuscated and privileges 'cisgendered masculine desire' in being accepting of

²¹⁰ Victoria Brooks and Jack Clayton Thompson, 'Dude Looks Like a Lady: Gender Deception, Consent and Ethics' (2019) 83 *The Journal of Criminal Law* 258, 271 (emphasis in original).

²¹¹ Participant 401353-401344-43686850

rape as communication failure myths. In gender deception cases, they suggest that this dynamic is reformulated by ‘the privileging of the ability to make a “straight” choice’ being blocked by the “deception” of the defendant.²¹² Similarly, here the ability of the complainant to make a “risk free” choice can be seen outranking the right to privacy, in participants’ estimations.

Jonathan Herring similarly observes the potential conflict between competing rights conceptualisation in sexual consent cases.²¹³ Although Herring is critical of non-disclosure, the emphasis that he places upon non-disclosure and transmission is perhaps indicative of the pre-TasP context in which his argument was developed.²¹⁴ Given that reckless transmission is unable to take place where the prospective defendant has an undetectable viral load, the argument that the autonomy of the prospective complainant should outweigh the privacy of the prospective defendant arguably carries much less weight. As Brooks and Thompson discuss,²¹⁵ Herring is also sympathetic to the argument that a transgender individual can be said to have a right to privacy, a right which is circumvented if the right to sexual autonomy of their partner is held as absolute.²¹⁶ To date, case law on HIV transmission has avoided these issues by considering disclosure and consent in relation to HIV transmission only as a non-fatal offence, not as a sexual offence. Unlike the extremely broad boundaries of a complainants right to know in gender identity cases, the criminal law in England and Wales has never prescribed the right to know a partner’s HIV status as absolute, making this

²¹² Brooks and Thompson (n 210) 265-266.

²¹³ Jonathan Herring, ‘Mistaken Sex’ [2005] Criminal Law Review 511.

²¹⁴ ‘[T]he principle of her personal autonomy is not enhanced if he is exculpated when he recklessly transmits the HIV virus to her’. See Herring (n 213) 518.

²¹⁵ Brooks and Thompson (n 210) 268–270.

²¹⁶ Herring (n 213) 522–523.

right dependent upon transmission risk. This distinction might be viewed through a temporal lens, in that whilst the focus of legal analysis might be said to rest upon the defendant's HIV status/gender identity *at the time* of consent,²¹⁷ risk can be evaluated without reference to the past. In contrast, (trans)gender identity cases focus on non-disclosure of identities which do not concord with prior presentations of gender, necessitating a broader temporal analysis of the case.²¹⁸

I would emphasise that the right of complainants to make genuinely informed consent decisions regarding instances of actual transmission risk is not disputed here. However, disclosure in order to take risk-reducing steps should be distinguished from disclosure which only serves to reassure and provide a sense of "safety". The former may be all but essential where a PLWHIV has a detectable viral load, so that condoms, PrEP, or another preventative technique can be employed. The latter, where viral load is undetectable, constitutes the prioritisation of "concern" and worry, over the privacy of those living with HIV. This can be seen most evidently when looking at another respondent, who highlights how the emotional reaction of the HIV-negative character might be dependent on whether "precautions" had been taken:

"If he had not taken precautions, he might be angry or upset or both. However if he had taken precautions he wouldn't have had to be concerned."²¹⁹

²¹⁷ Matthew Gibson, 'Deceptive Sexual Relations: A Theory of Criminal Liability' (2020) 40 Oxford Journal of Legal Studies 82, 90.

²¹⁸ For a critical analysis of gender identity cases and time, see Gibson (n 217). Gibson discusses how gender may 'fluctuate' and argues that legal analysis should focus on authentic gender presentation at the time of consent.

²¹⁹ Participant 401353-401344-41498475

Leaving aside the issue of why the TasP of the HIV+ character is not perceived as an effective precaution, despite the participant's awareness of U=U,²²⁰ disclosure is clearly positioned here as the catalyst for taking precautions and is therefore necessary in order to allow the HIV-negative character to feel more secure. Therefore, much like gender identity cases, concern seems to rest with the distress felt by HIV-negative people rather than the privacy of PLWHIV.²²¹ Given the prioritisation of the "right to know" over the right to privacy, it is notable, also, that several participants did continue the narrative of the vignette to address how they thought the HIV-negative character might behave upon discovering the status of the HIV+ character:

- "He might be angry/scared about having had sex with a positive person, and could 'warn' other people away from Ari"²²²
- "He would be furious and shocked scared and feel cheated he would block him or in anger write on his profile to defame Ari"²²³

Given the stigma directed towards people living with HIV, as discussed above, and the avoidance behaviours highlighted by several participants, that several participants suggested that an outing of the HIV+ character might take place is perhaps not surprising. Nevertheless, it emphasises the extent to which HIV-negativity is considered a normative position and how the emotional reactions to instances of non-disclosure reinforce the Othering of people living with HIV.

²²⁰ Additional discussion of what this suggests about the role of trust will feature in the next chapter.

²²¹ A similar point is made in relation to gender identity cases by Sharpe, who highlights the regular and repeated challenges facing people who are Transgender, which is often overlooked in contrast to the 'distress' felt by cisgender sexual partners upon 'discovering' their partner's gender identity history. See Alex Sharpe, 'The Ethicality of the Demand for (Trans)Parenthood in Sexual Relations' (2017) 43 Australian Feminist Law Journal 161, 169.

²²² Participant 401353-401344-40545646

²²³ Participant 401353-401344-41903701

4.6 Conclusion

In this chapter, I have focused on four themes developed from the data collected which underpin the analysis of later chapters: risk, safety, stigma and avoidance and the emotions of fear and anger. Drawing on Valverde's chronotopic form of analysis, I have suggested that there are spacio-temporal specificities produced by and producing several of the key concepts discussed above. The chronotopes of "risk" and "safety" highlight the contrast between the chronology of risk and the cyclical construction of safety. This contrast can be seen, in part, in the risk avoidance behaviours discussed by participants and the effect of emotions, such as fear, which constantly reinforce the desirability of safety to some participants. Such a contrast is, perhaps, unsurprising. Previous analysis of risk and safety discourses relating to HIV have highlighted temporal differences,²²⁴ whilst issues of scale can be observed in public health and criminalisation literature repeatedly.²²⁵ Nevertheless, in this chapter I have demonstrated that these spacio-temporal dynamics are *co-produced* by the concepts they are found within, rather than reflecting external models of time or space.

In the first section, I demonstrated how participants spoke of risk as something to be calculated or otherwise estimated, and as something to be managed or avoided through concepts such as the "red flag". These accounts also emphasised how people living with HIV continue to be conceptualised as the risk-embodying Other. That this *continues* to be the case speaks to the challenges of overcoming the historic association between people living with HIV and risk in

²²⁴ Dwayne C Turner, *Risky Sex* (Columbia University Press 1997) xiii.

²²⁵ See, for instance, Adam and others (n 113); see also Valverde (n 1), in particular, 173-175.

spite of the development of treatment as a form of prevention.²²⁶ Morson and Emerson, in their work on Bakhtin's development of the chronotope, suggest that 'a particular sort of event, or a particular place that usually serves as the locale for such an event, acquires a certain *chronotopic aura*, which is in fact the "echo of the generic whole" in which the event typically appears',²²⁷ and what I suggest here is that through the continued normative status of HIV-negativity and the continued framing of PLWHIV as the source of risk in sexual encounters, the 'chronotopic aura', to borrow Morson and Emerson's terminology, is one of individualisation and linearity, where there is a chronological progression from risk (or perceived risk) to resolution (through the avoidance, acceptance, management or realisation of that risk).

By way of contrast, the conceptualisation of safety by many participants demonstrated a much less static and more ongoing or cyclical dynamic. In the following two chapters, I will go on to argue that this is co-produced by the related concept of individual responsibility. As highlighted, participants spoke of safety as an ongoing commitment and something closely associated with individual control and choice. I went on to emphasise that the cyclical nature of safety is not intended to suggest that safety is not an active process, in fact the opposite. Whilst the chronotope of risk might be marked by an increased "tempo" where a risk must be navigated in some way,²²⁸ safety is perhaps to be understood as an *ongoing* and repeating call to maintain said "safety" by "being safe". In this way,

²²⁶ Asha Persson, "I Don't Blame That Guy That Gave It to Me": Contested Discourses of Victimisation and Culpability in the Narratives of Heterosexual Women Infected with HIV' (2014) 26 AIDS Care - Psychological and Socio-Medical Aspects of AIDS/HIV 233.

²²⁷ Morson and Emerson (n 3) 374 (my emphasis).

²²⁸ Kumpulainen et al speak of chronotopes being marked by changes in the 'tempo of an ongoing activity', see Kumpulainen, Mikkola and Jaatinen (n 2) 56.

the dissipation of safety over time I discuss highlights how the chronotope of safety, unlike risk, is less focused on the present in isolation and is instead 'always stretching between past and future'.²²⁹

In the latter half of the chapter, I discussed the ways in which risk and safety influenced the behaviours and attitudes of participants in relation to sexual health and HIV. Building on the work of Race and Robinson, I highlighted how some participants discuss using the disclosure feature of the dating applications I focus on to avoid contact with people perceived as *risky* in an effort to maintain perceived safety. I also suggested that stigma towards PLWHIV continues to be rife on these applications, potentially as a result of the way in which these disclosure features have been implemented,²³⁰ in a way which may maintain the relationship between hierarchies of perceived risk and desire suggested by others, notably Kagan.²³¹

Discussing the strong emotions felt by participants in relation to the scenarios used in the data collection survey, I argued that the fear and anger mentioned by participants was closely influencing and influenced by the competing chronotopes of risk and safety I have set out. As I will go on to highlight in the next chapter, the shifts in the understanding given to time are consequential, not only in how they impact the emotions and behaviours of those involved, but also in how the past is approached, either as a static, established event or as part of an ongoing and dynamic process, subject to change and reformulation.²³² In Chapter 5, I will

²²⁹ A phrase borrowed from Walker's discussion of 'operational time', in Walker (n 9) 54.

²³⁰ Giles (n 27).

²³¹ Kagan (n 36) 820.

²³² Walker (n 9) 55.

go on to argue that this change and reformulation is key to understanding how the chronotopes of risk and safety shape and are shaped by the legal conceptualisations of consent, disclosure and trust.

Chapter 5: Consent, Disclosure and Trust

5.1 Introduction

In the previous chapter, I illustrated how several of the concepts found in participants' accounts of dating application use, HIV disclosure, and sexual health more generally, had spacio-temporal specificities. I argued that these had an effect on individual strategies of safety and risk reductions, as well as on the stigma that continues to be directed towards and experienced by those living with HIV. I then went on to suggest that the differing constructions of time within these concepts had a relevancy to legal discourse, particularly to legal concepts such as consent, responsibility and personal autonomy. Building on that discussion, this chapter addresses participants' accounts of the influence of those concepts on themes related to disclosure, including trust, mistrust and the "right to know". The chapter then goes on to explore how HIV-related knowledge and status disclosure were understood and framed within the data. I explain how these understandings highlight the limitations of the contractual, conditional approach to consent as it has been discussed by Clough and others.¹

Recent developments relating to the concept of *sexual fraud*, such as the gender "deception" cases of *McNally* and *Newland* discussed in Chapter 2,² have established the importance of consent and trust narratives in criminal proceedings relating to deception and sexual activity. In those cases, the sexual autonomy of cisgender complainants has been prioritised over the right to privacy

¹ See Section 2.6 and Amanda Clough, 'Conditional Consent and Purposeful Deception' (2018) 82 *The Journal of Criminal Law* 178; see also Joseph J Fischel, *Screw Consent: A Better Politics of Sexual Justice* (University of California Press 2019).

² *R v McNally* [2013] EWCA Crim 1051; *R v Newland* [2017] (Unreported).

of transgender defendants, with the principle of informed consent being critical to arguments in favour of a “right to know” otherwise private information.³ In this chapter, I draw on participants’ accounts of a similar “right to know” – in this instance to know a prospective partner’s HIV status – and discuss how principles of choice, trust and control are employed in the context of dating application use in order to emphasise the perceived importance of disclosure. I demonstrate that there are limitations to evaluating HIV transmission cases solely through the lens of consent, particularly due to the inability to address the particular cultural narratives surrounding HIV, sexual health, and sex, generally, including those narratives associated with mobile dating application use. This reasoning draws upon recent criminal law literature, particularly the claims made by Fischel that:

[C]onsent restrictively narrows the spatial and temporal parameters of discussion. If we are talking about the presence or absence of consent, we are by definition talking only about a sexual encounter between two or more persons in the immediate present, right there and then. Consent talk fundamentally cannot address drinking and hookup culture on campus; fraternity and sorority culture and their comitant cultures of sexual pressure; impoverished sexual education; people’s sexual skill set or lack thereof; the routinized violence of homosociality; (consented to but sexually abusive) hazing; or better ways to communicate in the sexual encounter itself in order to enhance possibilities for pleasure and decrease possibilities for discomfort or regret.⁴

As well as the factors Fischel identifies, I mean to suggest that “consent talk” cannot adequately address the multitude of social and cultural factors surrounding HIV transmission.⁵ Nor can it accommodate the differing spatial and temporal dynamics of safety and risk outlined in Chapter 4. Although mobile

³ Alex Sharpe, ‘Sexual Intimacy, Gender Variance, and Criminal Law’ (2015) 33 *Nordic Journal of Human Rights* 380, 382; Tom O’Malley and Elisa Hoven, ‘Consent in the Law Relating to Sexual Offences’ in Kai Ambos and others (eds), *Core Concepts in Criminal Law and Criminal Justice* (Cambridge University Press 2019) 155.

⁴ Fischel (n 1) 18.

⁵ See Matthew Weait, *Intimacy and Responsibility: The Criminalisation of HIV Transmission* (Routledge-Cavendish 2007) 107–112.

dating applications offer a means of evidencing (non-)disclosure and therefore have some evidential value to “consent talk” issues at trial, the analysis here demonstrates that there are significant limitations as to what dating application profiles do and do not evidence.

Each of the three sections below discusses consent and other themes developed from the data. In the first section, I explore the relationship between trust and consent. Drawing on the work of Palmer,⁶ Adam,⁷ and others, I demonstrate how participants’ conceptualisations of trust highlight the liberal, quasi-contractual nature of *consent talk*. In shaping and being shaped by this construction of trust, I argue that the disclosure features on applications have the potential to both inhibit and enhance trust relationships between users. This consequently makes application-derived evidence significant in the context of HIV transmission cases, where trust has been a central theme of pro-criminalisation arguments.

Discussing consent and the law, I return to the transmission case law introduced in Chapter 2 and examine the concepts of “conditional consent” and “material facts”. I illustrate how many participants understand consent within a framework of choice and control, as discussed in Chapter 4, which in turn underpins the perceived “right to know” as it was discussed by some participants. I critique this “right” and highlight its relevance to debates on consent and disclosure within the law. This discussion precedes discussion in Chapter 6 where I explore how the

⁶ Tanya Palmer, ‘Distinguishing Sex from Sexual Violation’ in Alan Reed and others (eds), *Consent: Domestic and Comparative Perspectives* (Routledge 2017).

⁷ Barry D Adam, ‘Constructing the Neoliberal Sexual Actor: Responsibility and Care of the Self in the Discourse of Barebackers’ (2005) 7 *Culture, Health and Sexuality* 333; Barry D Adam and others, ‘Silence, Assent and HIV Risk’ (2008) 10 *Culture, Health and Sexuality* 759.

law, particularly the approach to consent applied in *Dica* and *Konzani*, employs a particular conceptualisation of sexual responsibility which is dispassionate and detached from the practical context and conditions facing those who are sexually active.⁸ In addition to acknowledging the emotional context of HIV disclosure, and sexual activity more broadly,⁹ I underscore the need to acknowledge that the concept of “materiality” is socially constructed, contextually contingent, and an unsound basis from which to determine criminal culpability.

Then, in the final substantive section, I address the themes of knowledge and disclosure. Participants’ accounts demonstrate that disclosure using the features seen on applications is often considered inadequate by those using apps and that disclosure of an undetectable viral load is open to misinterpretation, particularly where knowledge of treatment as prevention is absent, limited, or misunderstood. I consider the nature of online disclosure, the manner in which it can be both an active and a passive occurrence, and the additional weight that might be given to digital disclosure by jurors. The chapter concludes by questioning the role of application evidence in criminal proceedings, arguing that the ‘ambiguous’ nature of consent is liable to be compounded by the narrow construction of disclosure and consent as these are facilitated by dating applications.¹⁰

⁸ See Samantha Ryan, ‘Risk-Taking, Recklessness and HIV Transmission: Accommodating the Reality of Sexual Transmission of HIV within a Justifiable Approach to Criminal Liability’ (2007) 28 *Liverpool Law Review* 215, 247.

⁹ See, generally, John E Stannard, ‘The Emotional Dynamics of Consent’ (2015) 79 *The Journal of Criminal Law* 422.

¹⁰ For further discussion of the ambiguities of consent, see Palmer (n 6) 11–12 and discussion below.

5.2 Trust and Consent

Although a breach of trust is not an essential component of either HIV transmission offences themselves, or other possible sexual assault charges, it does play a significant role in the legal analysis of these potential offences.¹¹ Slater, in particular, has argued for an expanded use of the criminal law where non-disclosure occurs within a relationship of trust,¹² as I noted in Chapter 2.¹³ In addition, recent literature on “gender deception” and cases such as *McNally* and *Newland* have re-emphasised the role of trust, particularly in relation to determinations of consent, autonomy, deception and disclosure.¹⁴ In her analysis of these cases, Clough has suggested that trust is central to judicial interpretations of disclosure and non-disclosure, highlighting how actions which are seen to undermine trust and autonomy are drawn upon in establishing criminal culpability in both gender identity and disease transmission cases.¹⁵ Similarly, disclosure, trust, and their relationships with each other and consent was a central theme within participants’ responses.

In this section, I address the relationship between application use, trust and consent seen in this data. Focusing on the context specific norms and understandings discussed by participants, I highlight how apps are understood as both enhancing and inhibiting trust between users. I build on the arguments set out in Chapter 4 by suggesting that application profiles, particularly the HIV

¹¹ See James Slater, ‘HIV, Trust and the Criminal Law.’ (2011) 75 *Journal of Criminal Law* 309, 318; Sharon Cowan, ‘Offenses of Sex or Violence? Consent, Fraud, and HIV Transmission’ (2014) 17 *New Criminal Law Review* 135.

¹² Slater (n 11), in particular, 334-335.

¹³ See Section 2.4, above.

¹⁴ See, for example, Alex Sharpe, ‘Criminalising Sexual Intimacy: Transgender Defendants and the Legal Construction of Non-Consent’ [2014] *Criminal Law Review* 207, 215.

¹⁵ Clough (n 1) 186–188.

status and test history features, are used as a means of navigating perceived risks through disclosure and trust. In the third subsection, I discuss how some participants turn to other sources of information, screenshots of test results or awareness of TasP, as a means of verifying disclosed information. The final section addresses the importance of understanding trust and related rhetoric if the law is to acknowledge the practical realities of HIV disclosure within the social context of application use.

5.2.1 Trust, Casual Sexual Encounters and Mobile Applications

In *Dica*, Judge LJ distinguishes ‘loving, and trusting relationship[s]’ from ‘casual sex between complete strangers’.¹⁶ This judicial distinction has carried over into academic analysis, where it has been suggested that those engaging in casual sexual encounters take on individual responsibility for risk reduction whilst those in committed relationships do not.¹⁷ However, I would propose that this dichotomisation is overly simplistic and does not acknowledge how trust does or does not develop in different socio-sexual contexts. A common theme within responses here highlighted how applications can complement or enhance trust relationships between users, suggesting that even within “casual sex” there is the prospect of trust between partners.

As discussed in Chapter 4, disclosure of an HIV+ status was closely associated with many participants’ understanding and conceptualisation of risk, even where this disclosure emphasised an undetectable viral load. I return to this discussion,

¹⁶ *R v Dica* [2004] EWCA Crim 1103 [42] (Judge LJ).

¹⁷ See Slater (n 11) 325; JR Spencer, ‘Liability for Reckless Infection Pt 2’ (2004) 154 *New Law J* 448.

below, to highlight how the concepts of risk and safety frame participants' accounts of trust. Although many participants were unwilling to rely upon treatment as prevention as a safe sex strategy, many responses also suggest that users are inclined to believe the accuracy of disclosed undetectable statuses where these are listed:

“The picture is “wholesome” and I get the impression that the person’s claim to be looking for “chats, friends, dating and relationships” is genuine. The honest HIV status notification makes them seem trustworthy. However some inconsistencies - the age being different in the bio and the tag line and, more prominently, the dissonance between the aforementioned “wholesome” picture and the impersonal nature of “city centre” (which reads as an implied location of sex) - create slight apprehension.”¹⁸

Although the belief that disclosure is likely to be honest and accurate was not shared by all participants, a point returned to below, responses such as these tacitly acknowledge both the difficulties of disclosure and the stigma directed towards PLWHIV. These both have an influence on the importance and complexity of trust in the context of “casual” sexual encounters. Although not universally held, such beliefs demonstrate that some application users expect and value “trust” with those they meet online. This challenges the claim that “casual” sexual encounters take place in a trustless context and indicates that the picture is somewhat more complex in participants' experience. Similarly, several participants discussed the perception that some application users take sexual health “seriously” whilst others do not. Perceptions such as this can be interpreted as a context specific form of trust which arises in the context of online sexual encounters, resulting from the formalistic way applications incorporate sexual health information into user profiles. For example, one participant discussing the

¹⁸ Participant 401353-401344-42164365

“Couple” stimuli explained that disclosing sexual health information within the profile ‘[s]hows that the person it refers to takes sexual health seriously and although they are [in an] open [relationship] they are responsible’.¹⁹ This response is notable, not only because of the manner in which it frames disclosure and taking sexual health “seriously” as important, but also because of the approach it takes to “sexual responsibility”.

Race has pointed out that, historically, same-sex sexual encounters often occurred between strangers, particularly when these encounters took place in urban areas.²⁰ Application profiles and the HIV status information within them can be seen as one means of reducing concerns about risk,²¹ in part through establishing a foundation for trust between casual sexual partners, reducing concerns about unknown *strangers*.²² Participants’ construction of trust can be distinguished from practices of safety – such as monogamy, consistent condom use, and regular testing – which can, but do not necessarily, involve partners placing trust in one another.

Beyond disclosure of HIV status, there were two main ways in which participants perceived trust as being enhanced by this information. First, participants emphasised the importance of internal consistency within a profile if the user of that profile was to be trusted. Internal consistency was understood by participants, in part, through a contrast with the “dissonance” highlighted by the

¹⁹ Participant 401353-401344-42174917

²⁰ Kane Race, *The Gay Science: Intimate Experiments with the Problem of HIV* (Routledge 2017) 174.

²¹ Cameron Giles, ‘Digital Disclosure: HIV Status, Mobile Dating Application Design and Legal Responsibility’ [2020] *Information and Communications Technology Law*, 18.

²² See Section 4.2.2, above, and Andrew N Sharpe, *Foucault’s Monsters and the Challenge of Law* (Routledge 2010) 26–27.

participant quoted above.²³ Internal consistency was often judged by comparing different sections of the overall profile, for instance, the free-form section and “Looking For” section, and looking for inconsistencies, such as the different ages listed in the “Undetectable” stimuli. Participants acknowledged that minor inconsistencies such as the age difference could arise through genuine mistake or through information becoming outdated. However, greater weight was often attached to the consistency between the information in the profile and the impression given by the photo in a profile. One participant explained that where a user lists ‘information which matches their photo’ this ‘indicates a more reliable user’.²⁴

Second, participants discussed the importance of transparency and openness to establishing trust between application users. As with internal consistency, photos played a critical role in participants’ conceptualisation of transparency. Several responses highlighted how complete profiles and profiles which included a profile picture provided reassurance that interactions were genuine. Conversely, where profiles do not include a picture, this can be taken to indicate a reservedness about being visible:

“They are looking for one thing - sex. Some men are not interested in the additional details. They would happily see a picture (sometimes not) and meet the guy. He also does not appear to have a picture, which suggests to me he is discreet about his sexuality”.²⁵

Miller points out that photographs are included in application profiles for a number of different reasons and the inclusion or non-inclusion of photos can often be

²³ Participant 401353-401344-42164365

²⁴ Participant 401353-401344-42413617

²⁵ Participant 401353-401344-40168692

associated with different patterns of app usage or degrees of “outness”.²⁶ The data here supports this claim and suggests that application users draw upon cultural expectations towards visibility and “discretion” when making judgments about application profiles. As I pointed out in Chapter 2, the inclusion of more than one photograph in a user’s profile has become a more common application feature in the time since data collection in this project took place. The static nature of the vignette stimuli limits the extent to which this data can address these features, which may produce different beliefs concerning consistency and transparency. Nevertheless, given that the responses here indicate that photographs continue to be central to app users’ construction of trust these findings may provide a foundation for future research on this point. Given that internal consistency is a central sub-theme within these responses, any future research may wish to address if and how internal consistency is constructed when comparing photographs and if this is similar to or distinct from the internal consistency discussed above.

Finally, the desirability of trust and responsibility, as well as the broader role of desire within the social context of applications should also be noted. Several responses demonstrated the importance of disclosed sexual health information, not only as a means of enabling “safer” practices but also because a “responsible” persona was understood as desirable within the sexual communities that applications create. One participant explained:

²⁶ Brandon Miller, ‘A Picture Is Worth 1000 Messages: Investigating Face and Body Photos on Mobile Dating Apps for Men Who Have Sex with Men’ [2019] *Journal of Homosexuality*, 15. See also Brandon Miller, “Dude, Where’s Your Face?” Self-Presentation, Self-Description, and Partner Preferences on a Social Networking Application for Men Who Have Sex with Men: A Content Analysis’ (2015) 19 *Sexuality and Culture* 637

“They have had a fairly recent test - which means they care about their & their partner's sexual health to a degree - although the test refers only to HIV and not other STIs. They are also responsible enough to broadcast their status (if accurate) which may act as incentive for people to sleep with them but also may act as incentive for "clean" people to sleep with them.”²⁷

This participant, by emphasising the “incentive” provided by recent test information, highlights the importance of desire. In the previous chapter, I highlighted the desirability of safety as it was discussed by several participants. Responses such as this further demonstrate the importance of safety to many application users, whilst also showing how the principle of trust between sexual partners, seen in the participant’s reference to ‘care’, is similarly understood as desirable, at least to some users. Given that testing and “responsible” practices have long been understood as carrying sexual capital,²⁸ it is perhaps unsurprising that some men who have sex with men employ testing and status disclosure in this way.²⁹ In the context of mobile dating applications, this disclosure may represent a form of ‘respectable promiscuity’, as discussed by Ahlm,³⁰ where a shared understanding of discrete meanings and insider knowledge are employed by application users to facilitate sexual interaction without those interactions being fully understood by those outside of the app user community.

These varying accounts of trust and responsibility, as well as the discussion of trust more broadly seen within the data, indicate that rather than being an absent

²⁷ Participant 401353-401344-43683239

²⁸ See Adam and others (n 7) 769; and, more generally, Adam Isaiah Green, ‘Playing the (Sexual) Field: The Interactional Basis of Systems of Sexual Stratification’ (2011) 74 *Social Psychology Quarterly* 244, 247.

²⁹ See Seung Hee Lee and Nicolas Sheon, ‘Responsibility and Risk: Accounts of Reasons for Seeking an HIV Test’ (2008) 30 *Sociology of Health and Illness* 167 and Section 4.2.3, above.

³⁰ Jody Ahlm, ‘Respectable Promiscuity: Digital Cruising in an Era of Queer Liberalism’ (2017) 20 *Sexualities* 364.

factor in application-facilitated sexual encounters, trust does influence many application users' perceptions as well as their belief in the information they encounter online. The design of applications and the "HIV Status" and "Test History", particularly, rely on or engage with users' trust and expectations towards transparency and consistency. However, trust was far from a universal premise within the data and mistrust, which I now turn to, was also discussed prominently.

5.2.2 Mistrust and Disbelief

Like many of the participants who discussed trust, where participants expressed reservations about believing the information they encountered whilst browsing applications, the importance of safety and risk reduction were also frequently emphasised. Several participants discussed consistently doubting or questioning the accuracy of information found in profiles, including information relating to sexual health. Photographs were, again, one of the components of a profile which were regularly scrutinised in this way:

"They leave very little information about themselves, particularly the HIV status section. I personally wouldn't chat with this person as they have no photo and no indication of who they are."³¹

The mistrust of those without profile pictures is a commonly reported attitude of those using online dating services, as Mowlabocus highlights in his research into *Gaydar*, a site targeting gay men which preceded the emergence of mobile applications.³² The expression "No Pic? No Dick!" noted by Mowlabocus,³³

³¹ Participant 401353-401344-41483556

³² Sharif Mowlabocus, 'Look at Me! Images, Validation, and Cultural Currency on Gaydar' in Christopher Pullen and Margaret Cooper (eds), *LGBT Identity and Online New Media* (Routledge 2010).

³³ Mowlabocus (n 32) 205.

which reflects a common suspicion of photoless profiles on dating websites, is echoed in the response here. Whilst, previously, high-quality digital photographs might have been considered relatively uncommon on dating websites because of limitations in internet speeds and the cost of high-quality digital cameras, the ease with which users can now take pictures, including on modern smartphones, may reinforce concerns such as those discussed by the participant about profiles without a profile picture. The strategy of avoiding interaction with such profiles discussed by the participant can, therefore, be understood as an indication of the social capital photos have in online networking spaces as well as an acknowledgement that this capital is easy to obtain,³⁴ as well as being another strategy of safety which participants discussed “always” adhering to.³⁵

The absence of photographs can be understood as a particular concern for some users stemming from the design of dating applications. The format of applications, designed to be viewed on a handheld device, restricts the quantity and quality of information which can be included in profiles, including and beyond photographs.³⁶ Participants also expressed concerns, however, about the accuracy of photos which were included. Markowitz and Hancock point out that the deceptive use of photographs is relatively common on mobile dating applications.³⁷ Yet, this commonality may also result in a general ambivalence towards low-level deception, where users are comfortable with minor

³⁴ For further discussion of the ‘sexual economy’, see Kane Race, ‘Click Here for HIV Status: Shifting Templates of Sexual Negotiation’ (2010) 3 *Emotion, Space and Society* 7, 10.

³⁵ Although the extent to which these rules are sustainable in practice may be limited. See Brandon Andrew Robinson, ‘Doing Sexual Responsibility: HIV, Risk Discourses, Trust, and Gay Men Interacting Online’ (2018) 61 *Sociological Perspectives* 383.

³⁶ Miller, ‘A Picture Is Worth 1000 Messages: Investigating Face and Body Photos on Mobile Dating Apps for Men Who Have Sex with Men’ (n 26).

³⁷ David M Markowitz and Jeffrey T Hancock, ‘Deception in Mobile Dating Conversations’ (2018) 68 *Journal of Communication* 547.

misrepresentations which might be related to impression management.³⁸ Several participants suggested that minor deceptions of this kind were expected:

“People constant change their ages to look more pleasing, some guys want daddies so they change their age to fit the son profile[.]”³⁹

Markowitz and Hancock note that deception can benefit application users in respect of certain short-term goals; which include ‘casual sex, and entertainment browsing’.⁴⁰ In practice, given the multifaceted aims behind mobile application use,⁴¹ the interpretations given to particular deceptions may be similarly multifaceted and the apathy towards low level deception cannot be considered universal. Indeed, several participants expressed extreme reservations about *any* information found in profiles, including, notably, reservations about the HIV disclosure and test history features:

“The HIV status row tells us nothing more than that the person has ticked the undetectable box. It tells us nothing about whether the person has HIV, or their status. The test history row tells us nothing more than that the person has entered 01-09-2018 into the row to suggest that they were last tested on that date. It tells us nothing about whether the person has HIV, their status, or whether they have been tested.”⁴²

Although this level of mistrust was relatively uncommon, many participants did highlight how errors, such as the age inconsistency in one of the vignettes, resulted in a more general concern about details such as sexual health information:

“Not sure that the test history on its own says much - but given the errors or lies in the rest of the profile I don’t believe it. For the same reason I don’t believe his status either[.]”⁴³

³⁸ Markowitz and Hancock (n 37).

³⁹ Participant 401353-401344-41903701

⁴⁰ Markowitz and Hancock (n 37) 565.

⁴¹ Ahlm (n 30).

⁴² Participant 401353-401344-40159734

⁴³ Participant 401353-401344-40170914

These responses underscore the mistrust which also arises in the context of mobile application use. The complex juxtaposition of trust and mistrust within participants' accounts, including the expectations of truth and dishonesty surrounding HIV status, are further complicated by the strategies used to overcome mistrust. Although the information provided in application profiles, where completed, was often referred to in responses, a small but notable number of participants discussed trust based on other sources of information and evidence.

5.2.3 Mobile Applications, Trust and Verification

Many mobile dating application developers do signpost to other sources of information on sexual health matters. Often, this is achieved through links on their own websites and through their broader social media presence online.⁴⁴ Whilst some developers offer definitions of different HIV statuses in materials which discuss the disclosure features they have introduced,⁴⁵ conformity with either their own or third party definitions is not enforced by application moderators. The concerns noted in the previous section may be one consequence of the uncertainty this creates, and several participants reflected on the need for additional evidence to verify the sexual health information found in app profiles. This was particularly notable in the vignettes which explored undetectable viral loads. In response to those stimuli, several participants suggested that evidence

⁴⁴ See, for example, Hornet, 'My Boyfriend Is #HIV+ but Undetectable, Can I Still Get It If We Don't Use Condoms? #AskAPro @AlexGarnerLA' (*Twitter*, 9 November 2017); Grindr LLC, 'How Often Should I Get an HIV/STD Test?' (*Help.Grindr.com*) <<https://help.grindr.com/hc/en-us/articles/230933567-How-often-should-I-get-an-HIV-STD-test->> accessed 8 August 2020.

⁴⁵ See Hornet, 'Know Your Status: What Do the Different KYS Options Mean?' <<https://hornet.com/about/know-your-status/>> accessed 15 August 2019.

such as viral load test results would overcome anxieties whilst mere disclosure would not:

“[F]rom [the] point of view [of the character who disclosed an undetectable viral load], he knows that there's less risk for [the HIV-negative character] hooking up with him than hooking up with someone who hadn't even tested for ages. but there's no reason for [the HIV-negative character] to trust a stranger saying they're undetectable. if [the HIV-negative character] could trust that [the prospective sexual partner] is undetectable, then that would be far less anxiety-inducing than hooking up with someone who didn't know their status in the first place, as I'd assume any stranger who says they're negative could either be lying or unaware and may well be positive. but if you already know for sure that someone's positive, then of course you need to know if they're undetectable. and either way, use condoms. so I don't think [the character with an undetectable viral load] can lie to a direct question, the best he can do is make it clear he's undetectable, provide a screenshot of some official confirmation so it's clear, and hope [the HIV-negative character] is knowledgeable enough to get that undetectable means no risk.”⁴⁶

Robinson observes that although a HIV status can be listed on the dating websites he investigates, ‘some men still take other measures to try to determine the HIV status of their sexual partner’.⁴⁷ In particular, he notes that some men employ tactics such as the ‘bathroom snoop’, searching through bathroom cabinets for HIV medication.⁴⁸ Similarly, O’Leary notes how some men use their own knowledge of HIV treatment regimens as a means of investigating their partner’s HIV status.⁴⁹ Similarly, some participants also spoke of inquiring about medication and treatment regimes in order to verify that an undetectable viral load was genuine and asking HIV+ characters in the vignettes for ‘more information about [their] test history and what medication [they use]’.⁵⁰ Several participants

⁴⁶ Participant 401353-401344-41917008

⁴⁷ Robinson (n 35) 391.

⁴⁸ Robinson (n 35) 391.

⁴⁹ Ann O’Leary, ‘Guessing Games: Sex Partner Serostatus Assumptions Among HIV-Positive Gay and Bisexual Men.’ in Perry N Halkitis, Cynthia A Gómez and Richard J Wolitski (eds), *HIV+ sex: The psychological and interpersonal dynamics of HIV-seropositive gay and bisexual men’s relationships*. (American Psychological Association 2006) 127.

⁵⁰ Participant 401353-401344-42346483

spoke of disclosure and supporting evidence facilitating HIV-negative characters taking greater control over their sexual health.⁵¹ Discussing a scenario where disclosure had not taken place prior to sexual activity, one participant spoke of disclosure facilitating the decision to '[take] PEP until [the HIV+ character's] viral load status [could] be independently verified'.⁵²

As I discuss in Section 5.4, below, these practices contrast with the prototypical complainant in transmission case law. In Chapter 2, I highlighted existing case law that has determined that, in general, a complainant's pre-existing knowledge of HIV transmission and prevention is insufficient for informed consent.⁵³ However, the data here indicates that some men using dating applications *are* informed about HIV transmission, to the extent that they employ this knowledge to scrutinise the disclosure of others. Similarly, other participants discussed seeking external evidence to verify disclosure taking place on applications in a way which drew on their existing knowledge:

“The men on dating apps seem to like playing games or lie a lot. So even if they said they're all clear and tested I'd like to see a screenshot from their sexual health clinic test. Additionally they lie about their pictures so I'd like to see them on sc where it's a live picture.”⁵⁴

Responses such as this are in keeping with the approach to safety discussed in Chapter 4 and reflect the value given to *recent* test results. The participant also discusses using 'sc', an abbreviation of snapchat, to verify the identity of those they speak to through video messaging. The use of other mobile applications

⁵¹ On the general mistrust of PLWHIV in relation to sexual health, see Iain Williamson and others, “There's This Glorious Pill”: Gay and Bisexual Men in the English Midlands Navigate Risk Responsibility and Pre-Exposure Prophylaxis' (2019) 29 *Critical Public Health* 560.

⁵² Participant 401353-401344-40179081

⁵³ See Section 2.2.2 and Matthew Weait, 'Knowledge, Autonomy and Consent: R v Konzani' [2005] *Criminal Law Review* 763, 765–766.

⁵⁴ Participant 401353-401344-41514592

such as snapchat, as part of 'a staged series of online and offline interactions, across a range of networked platforms and spaces' through which application users can build up trust with other application users, has been noted elsewhere.⁵⁵ As well as overt use of these tools to verify information, through live interaction with the encountered other, the covert use of social networking sites and other sources of information has been extensively observed in empirical analysis.⁵⁶ However, in relation to issues of sexual health, as seen in the account above, participants also report relying on more direct measures.

5.2.4 The Role of Trust

So far in this section, I have demonstrated that both trust and mistrust feature significantly in participants' responses. I have also observed that the design of mobile dating applications and participants' broader knowledge of sexual health can influence and prompt these attitudes. On first inspection, this analysis might suggest that the categorisation of casual sexual relationships as untrusting, in contrast to committed relationships of trust, is overly simplistic. For instance, Spencer suggests that the risk of disease transmission 'comes with the territory' of casual or commercial sexual relationships,⁵⁷ and Slater proposes reforms which criminalise 'non-disclosure when it constitutes a breach of trust'.⁵⁸ Slater's arguments are based on the claim that there is an inherent value in sexual partners being able to trust one another and therefore dispense with 'due-

⁵⁵ Kath Albury and Paul Byron, 'Safe on My Phone? Same-Sex Attracted Young People's Negotiations of Intimacy, Visibility, and Risk on Digital Hook-Up Apps' (2016) 2 *Social Media and Society* 5.

⁵⁶ See, for example, Joni Meenagh, 'Flirting, Dating, and Breaking up within New Media Environments' (2015) 15 *Sex Education* 458.

⁵⁷ Spencer (n 17).

⁵⁸ Slater (n 11) 309.

diligence' at the time of each sexual encounter.⁵⁹ Like Spencer's claims, this argument draws distinctions between certain types of relationship. Slater claims that the 'social capital' of trust is contextual and that 'betrayal' of that trust only constitutes wrongdoing where it is the 'exploitation of vulnerability within the context of a certain kind of relationship'.⁶⁰ Casual sexual relationships are explicitly excluded from this *context of trust*:

"In a casual sexual relationship where the parties concerned are more or less strangers, the ignorant party has no justified reason to trust the other party; as a result, her trusting, or more accurately her reliance on the other party, is entirely voluntary."⁶¹

The data here might, therefore, be used to challenge this conceptualisation and to argue that trust can factor into casual sexual relationships. There are, however, two key reasons for not doing so: firstly, because this fails to acknowledge the complex interrelationship between trust and mistrust, and second, because it constructs trust as somewhat unidirectional and privileges HIV-negativity.

Emphasising the context of mobile application use, several participants discussed deception being rife in the context of application use:

"Ultimately there is a very ferocious battle to meet with some 'hot' and get your load out. This battle sees people use false imagery, lies, deception and omissions. I have been tricked into meeting people who are clearly not the people in the images they have sent me, and been stood up by more guys who have simply blocked me when I have been within the immediate vicinity. Slowly though I have gathered a small close group of gay friends that I trust. We have all had bad experiences, but we all seemed captivated by the opportunity of meeting mr perfect."⁶²

This example highlights that application use is associated, by some, with a highly sexualised lifestyle which results in concerns regarding deception and trust.

⁵⁹ Slater (n 11) at 309 and 319.

⁶⁰ Slater (n 11) 319.

⁶¹ Slater (n 11) 321.

⁶² Participant 401353-401344-42316129

However, it also demonstrates that mistrust, even significant mistrust, is not static but instead changes and develops over time. As I discussed above, applications offer several methods for establishing trust, including through photographs and internal consistency. Several applications have also enabled users to link social media profiles to their application profile which, along with the ad hoc use of social media services such as snapchat, provides a further means of trust enhancement.

On the one hand, it is possible to use this analysis to argue for a detailed examination of trust in each individual case. Rather than excluding casual relationships out of hand, this would entail exploring whether there was a breach of trust in each case, irrespective of the categorisation of the relationship. On the other hand, this analysis might also suggest that the dichotomy of trust/mistrust in sexual relationships is an inappropriate foundation for criminal culpability. Given the multifaceted discussion of trust seen in the data, I am inclined to support this second approach. Gore notes that several 'legal dichotomies' fail to acknowledge the complexity of lived experiences and employ an 'all or nothing' approach, particularly in the area of sexual offences.⁶³ Whilst Gore focuses on the legal construction of 'reasonable belief', arguing that the dichotomy presented to juries is detached from the lived context of female complainants,⁶⁴ this is equally applicable to trust. Any legal dichotomy of trust is inherently unable to reflect the practical experiences of men who have sex with men navigating

⁶³ Ashlee Gore, 'It's All or Nothing: Consent, Reasonable Belief, and the Continuum of Sexual Violence in Judicial Logic' [2020] *Social & Legal Studies* at 9.

⁶⁴ Gore (n 63).

applications, including experiences of risk, safety and other themes seen in this data.

On the relationship between trust and law, Sharpe argues that:

[A] focus on trust in the criminal law context may be less appropriate because of the different and non-professional nature of the relationship [between complainant and defendant, when compared to doctor-patient relationships,] and because of the implications for liberty that necessarily attend the criminal law.⁶⁵

Nevertheless, Sharpe notes that trust continues to underpin the developments seen in the law relating to “sexual fraud”.⁶⁶ Similarly, drawing on trust and mistrust in HIV transmission cases arguably misrepresents the nature of HIV risk and risk reduction. Trust instead privileges HIV-negative individuals, facilitating avoidance strategies such as those discussed in the previous chapter and overlooking the privacy claims of people living with HIV. Whilst the privacy rights of those living with HIV are not undermined to the extent seen in gender “fraud” cases, where the privacy rights of transgender defendants are further undervalued through the construction of passive non-disclosure as “active deception”,⁶⁷ insufficient consideration is still given to the balance of rights and responsibilities between sexual partners.⁶⁸ Although *EB* retained the possibility that *active deception* regarding HIV status *might* do so, as I highlighted in Chapter 2 this was not the approach taken in *Rowe*, where intentional transmission was dealt with via s.18 OAPA 1861.⁶⁹

⁶⁵ Alex Sharpe, ‘Expanding Liability for Sexual Fraud Through the Concept of ‘Active Deception: A Flawed Approach’ (2016) 80 *The Journal of Criminal Law* 28.

⁶⁶ Sharpe, ‘Expanding Liability for Sexual Fraud Through the Concept of ‘Active Deception: A Flawed Approach’ (n 65).

⁶⁷ Sharpe, ‘Expanding Liability for Sexual Fraud Through the Concept of ‘Active Deception: A Flawed Approach’ (n 65).

⁶⁸ Samantha Ryan, “Active Deception” v Non-Disclosure: HIV Transmission, Non-Fatal Offences and Criminal Responsibility’ [2019] *Criminal Law Review* 4.

⁶⁹ *R v EB* [2006] EWCA Crim 2945; *R v Rowe* [2018] EWCA Crim 2688.

Trust, when employed in a criminal law context, is effectively a legal fiction. As with all legal fictions it is underlined by normative thinking and context specific norms and rationales, which can be scrutinised in order to evaluate the fiction as a whole.⁷⁰ Not only do trust narratives continue to position HIV-negative men as inherently vulnerable to the deceptions of those living with HIV,⁷¹ reinforcing the externalisation of HIV risk seen in the chronotope of risk outlined in the previous chapter, they also fail to acknowledge trust *by* those living with HIV. Frances and Frances argue that trust goes both ways and that the concept of trust should not be employed punitively to criminalise those already subject to stigma and marginalisation,⁷² which might be considered breaches of a broader trust in sexual solidarity. To this extent, the role of trust in legal discourse on “sexual fraud” underpins the detached ‘rhetoric of liberalism’ and individualism that many have sought to criticise in literature on sexual consent.⁷³ On this basis, the role of trust as a standalone concept supporting further criminalisation of those living with HIV should be rejected and its more general role in discussion of consent, to which I now turn, challenged.

5.3 Consent and HIV Transmission Criminalisation

Many participants discussed the concept of consent, but relatively few responses made direct reference to the criminal law.⁷⁴ Although the particular legal

⁷⁰ Peter Westen, *The Logic of Consent* (Ashgate 2004) 325.

⁷¹ On this point, see the discussion of the ‘Trust Him’ Campaign in Octavio R González, ‘HIV Pre-Exposure Prophylaxis (PrEP), “The Truvada Whore”, and The New Gay Sexual Revolution’ in Ricky Varghese (ed), *Raw* (Zed 2019).

⁷² Leslie P Francis and John G Francis, ‘Criminalizing Health-Related Behaviors Dangerous to Others? Disease Transmission, Transmission-Facilitation, and the Importance of Trust’ (2012) 6 *Criminal Law and Philosophy* 47, 48–49.

⁷³ Vanessa Munro, ‘Constructing Consent: Legislating Freedom and Legitimizing Constraint in the Expression of Sexual Autonomy’ (2008) 41 *Akron Law Review* 923, 929.

⁷⁴ I analyse discussion of the law within the data in Section 6.4, below.

formulations of consent seen in *Dica*, *Konzani*, and other case law, did not appear to be a significant influence upon the majority of participants' understanding of consent, their responses nevertheless address two core concepts associated with those cases: the concept of autonomy or choice, and the concept of a "right to know" (a prospective partner's HIV status). In this section, building on the discussion of safety, avoidance and risk in Chapter 4, I challenge the "right to know" and highlight the limitations of consent as *the* determining factor in HIV transmission cases. Examining the concept of "materiality" and HIV disclosure, I argue that the consent-centric approach to HIV transmission in criminal law employs a quasi-contractual construction of consent. I demonstrate how this approach draws upon cultural narratives surrounding sex and sexuality, exemplified in participants' accounts, but argue that these narratives are a poor basis for determining criminal culpability.

As highlighted in Chapter 4, many participants spoke about the importance of HIV-negative individuals having the choice of whether to have sex with a partner living with HIV. One of the main ways in which participants addressed consent was through discussion of *informed* consent, which focused on HIV-negative characters having *sufficient* knowledge of the viral status of their partners so that they could choose whether or not to have sex:

"[The HIV-negative character] might be scared and worried about what if he gets HIV. Some hate and disgust at the fact [the HIV+ character] didn't tell him before hand either so [the HIV-negative character] could've made a fully informed choice of sex."⁷⁵

⁷⁵ Participant 401353-401344-41514592

Several participants were similarly critical of non-disclosure because it impeded the ability of HIV-negative individuals to control who they had sex with, underscoring the prevalence of the avoidance behaviours highlighted in the previous chapter. This construction of consent as control/choice reflects the normative position of HIV-negativity in multiple ways. Firstly, it emphasises how being HIV-negative is assumed by many to be the default position, as exemplified by a participant who distinguished between his own non-disclosure and that of a HIV-positive person: “I don’t personally alt give mine but I’m negative”.⁷⁶ The privilege of those with ‘a “normal” body’, according to Lacey, involves those with “abnormal” bodies being relegated from the ‘privileged model of the rational choosing individual’.⁷⁷ Although Lacey focuses on bodies considered abnormal because of gender and sexuality, responses such as the one above demonstrate how people living with HIV are marked out as exceptional.

Secondly, consent as choice draws on this distinction between “normal” and “abnormal” and frames silence as a passive omission only to those considered to have “normal” bodies. In addition to the participant above, several responses reflected silence as the default position for those who are HIV-negative who were only expected to disclose when asked or when *they* considered it relevant. For instance, one participant explained:

“I didn't fill mine out on my profile until I was asked specifically about it. For people who want chats or dates it's not too important[.]”⁷⁸

⁷⁶ Participant 401353-401344-42526627

⁷⁷ Nicola Lacey, ‘Unspeakable Subjects, Impossible Rights: Sexuality, Integrity and Criminal Law’ (1998) 11 *Canadian Journal of Law and Jurisprudence* 47, 55.

⁷⁸ Participant 401353-401344-40166180

Returning to the law, *Konzani* constructs silence as inherently deceptive, subject to the potential exception relating to indirect disclosure, and blurs the act/omission distinction by suggesting that defendants may give 'implicit guarantees' concerning their serostatus.⁷⁹ In this response, silence is seen as unremarkable, particularly when applications are used for social and romantic endeavours. However, this was not the case in many responses discussing the silence of those living with HIV:

"If [the HIV-negative character] found out [the undetectable character] was HIV positive but hadn't revealed it in his profile, he'd probably feel deceived by him, and would seek to get tested himself."⁸⁰

This example highlights how silence is not seen as unremarkable when it is the silence of the HIV+, even in situations where transmission risk is absent. This further emphasises how many participants saw disclosure as necessary in order to avoid those living with HIV, rather than as a means of facilitating consensual risk reduction. As I stressed in the previous chapter, statements of this kind also serve to externalise risk, situating transmission risk with HIV+ bodies rather as a feature of unprotected sexual intercourse participated in by serodiscordant partners. As a consequence, several participants spoke of PLWHIV placing the HIV-negative "at risk":

I think [the HIV-negative character] would be annoyed that he was not told beforehand as it could put him at risk. I would expect him to go and get tested as soon as possible to confirm that he is negative.⁸¹

As this response exemplifies, the externalisation of risk and the construction of safety has an effect, not only on behaviours such as avoidance, but also on participants' understanding of consent. The manner in which participants

⁷⁹ See Section 2.7 and Wait (n 5) 52.

⁸⁰ Participant 401353-401344-42121132

⁸¹ Participant 401353-401344-41482345

discussed consent stresses the importance of choice, or control, over their sexual partners and the “riskiness” of those partners. The narrative of risk creation and imposition set out by the participant is particularly significant in the context of the active/passive dichotomy, discussed in literature on sexual consent. As Palmer notes, within a consent driven legal framework, sexual encounters are constructed as ‘inherently asymmetrical and unequal’ rather than positioning partners as ‘collaborators in the creation of a mutually satisfying experience’, and that such an approach frames potential sexual partners as threats or barriers to overcome.⁸² By attributing PLWHIV as active (placing others “at risk”) and the HIV- as passive (being placed “at risk”), responses such as this reflect a broader cultural determination of the two concepts.⁸³ A similar cultural influence has been observed by Malloch,⁸⁴ in relation to gender, and Lacey, in relation to sexuality.⁸⁵ Arguably, the cultural framing of HIV-positivity as other than the norm informs this distinction and constructs silence as both an active and morally (and potentially legally) condemnable act.⁸⁶

It should be acknowledged that the situating of risk and risk creation with those living with HIV was not universal within the data. A minority of participants did reflect on the “riskiness” of their own behaviour, although typically this was to highlight that their own behaviour minimised their exposure to external risks:

⁸² Palmer (n 6) 12–13.

⁸³ Palmer (n 6) 13.

⁸⁴ Margaret S Malloch, ““Risky” Women, Sexual Consent and Criminal “Justice” in Mark Cowling and Paul Reynolds (eds), *Making Sense of Sexual Consent* (Routledge 2004) 115.

⁸⁵ Lacey (n 77) 61.

⁸⁶ Sharon Cowan, ‘The Pain of Pleasure: Consent and the Criminalisation of Sado-Masochistic “Assaults” in James Chalmers, Fiona Leverick and Lindsay Farmer (eds), *Essays in Criminal Law in Honour of Sir Gerald Gordon* (Edinburgh University Press 2010), in particular, section B.

“I suppose just that as a fairly strict side HIV status is pretty irrelevant to me as my preferred sexual practices aren't 'risky' in that regard. So it's something I don't pay much attention to in profiles[.]”⁸⁷

Responses such as this recognise that HIV-negative individuals participate in practices which carry risks of varying degrees and do so without situating risk with an identified Other. Returning to the construction of consent as choice or control over risk taking, the acknowledgement of risk *taking* by those HIV-negative was discussed by some participants who highlighted how risk reduction strategies might reduce or eliminate the need for status disclosure. One participant, discussing a vignette character who disclosed an undetectable viral load explained:

“That would mean they are HIV positive but are on medication that means their viral load is undetectable. That would mean they would be able to engage in sexual intercourse without risk of passing on the virus. I would not have bareback sex with anyone I wasn't in a relationship with; I know that someone undetectable cannot pass on the virus, but I don't know whether a stranger is truly undetectable. That is the same logic as my not having unprotected sex with someone who says they are HIV negative.”

The same participant went on to discuss a scenario involving non-disclosure of an undetectable viral load, and stated:

“[The character] may not want the stigma. If [he] is 100% certain that he is still undetectable - that he has not missed any of his pills etc - then it is fine for him not to disclose. The onus is on the individual to practice safe sex - so [the HIV-negative character] should not have unprotected sex - he should use a condom or be on PREP. Likewise, [the HIV+ character] should ensure that he is undetectable (which in this situation he has); given this, he doesn't need to disclose. However, he should also refrain from unprotected sex because he should avoid passing on (and contracting) other STIs.”⁸⁸

The emphasis this participant places on the actions and responsibilities of *individuals* reflects the fundamental individualism of consent. For Palmer,

⁸⁷ Participant 401353-401344-42628211

⁸⁸ Participant 401353-401344-40159893

'consent is enmeshed with a particularly individualistic notion of the Kantian liberal subject'.⁸⁹ Although individual autonomy is a feature of this liberalism,⁹⁰ it is not without limitations. Chapter 2 highlighted how security and (self-) surveillance practices are connected with the idea of the universal rational subject and that this delegitimises "risky" choices.⁹¹ The ambiguity of this delegitimation can be seen in the distinction between HIV transmission cases, where a consent defence (however limited) is available, and sadomasochism cases, where it is not.⁹² Weait observes how this is reflective of the 'tension in the law in which the right of legal subjects to choose how they wish to interact is subject to wider, policy-based and morally informed notions of what the public interest demands.'⁹³

This tension has resulted in claims such as those by Baker, who argues that 'surely those who engage in unprotected casual sex are also risking their human dignity', undermining the availability of even an informed consent defence.⁹⁴ As well as being a minority view in legal analysis, this perspective on casual sexual encounters is transparently one-sided and simplistic. It fails to reflect upon the dynamics of trust, set out above, or risk and safety, set out in Chapter 4. Instead of engaging with the practices of those who have casual sex, including the practices of condom cessation and disclosure linked with online dating,⁹⁵ this approach focuses upon the *act* of disclosure or non-disclosure and associated

⁸⁹ Palmer (n 6) 11.

⁹⁰ Diana Young, 'Individual Rights and the Negotiation of Governmental Power' (2015) 24 *Social & Legal Studies* 113, 117.

⁹¹ See Section 2.5.

⁹² Cowan, 'The Pain of Pleasure: Consent and the Criminalisation of Sado-Masochistic "Assaults"' (n 86).

⁹³ Weait (n 5) 172.

⁹⁴ Dennis J Baker, 'The Moral Limits of Consent as a Defense in the Criminal Law' (2009) 12 *New Criminal Law Review* 93, 108.

⁹⁵ Race, 'Click Here for HIV Status: Shifting Templates of Sexual Negotiation' (n 34).

claims related to sexual morality.⁹⁶ In contrast to the participant above, and the minority of similar responses who acknowledged the responsibility of those maintaining an undetectable viral load, the emphasis on sexual morality and responsibility can be seen in the *right to know* certain *material facts*.

5.3.1 The “Right to Know”

For many participants, status disclosure, irrespective of the actual transmission risks present in a particular situation, was necessary because, in their accounts, HIV-negative sexual actors have a “right to know” the HIV status of their partners. As Gostin and Hodge note, the right to know sexual health information relating to one’s partner has a longstanding foundation in public health messaging, especially in partner notification programs, where disclosure is seen to empower individuals to make informed decisions and take responsibility for their own health.⁹⁷ However, as I will discuss below, participants’ conceptualisation of the “right to know” extended beyond information necessary to prevent HIV transmission. It was also used by some participants to explain the angry and emotive reactions to non-disclosure discussed in Chapter 4:

“I’d understand anger as a sexual partner has a *right to know*[.]”⁹⁸

Several participants similarly explained that, irrespective of the risks in a given situation, they felt that disclosure should take place prior to a sexual encounter because of a similar *right to know*. Notably, for some participants, this

⁹⁶ Wait (n 5) 189–190.

⁹⁷ Lawrence Gostin and James G Hodge, ‘Piercing the Veil of Secrecy in HIV/AIDS and Other Sexually Transmitted Diseases: Theories of Privacy and Disclosure in Partner Notification.’ (1998) 5 *Duke Journal of Gender law & policy* 9, 21, 65–67.

⁹⁸ Participant 401353-401344-40158345 (my emphasis).

necessitated (or, at least, strongly encouraged) disclosure within application profiles, whereas, for others, it was sufficient that disclosure take place at any stage prior to sex. Compare, for example:

“I think it is probably because of a worry of misunderstanding and Stereotypes around the issue. It’s difficult as it would likely require him to explain it but I would prefer that he disclosed this on his profile.”⁹⁹

and,

“Because he is young and possibly ashamed to reveal his status. My view on his decision not to do so is two fold: 1) [The HIV+ character] has every right to privacy. There is no need for him to put it on his status. 2) If [he] intends to sleep with [the other character], [the other character] should have been told prior to the get together being finalised.”¹⁰⁰

It is significant that in the second excerpt the participant discusses the conflict that may arise between the justifiable right to privacy that PLWHIV have regarding their status and the *right to know* of a sexual partner. In this response, although privacy justifies not including the information in a public profile, it is not sufficient to prevent a duty to disclose based on the *right to know*.

Privacy was a factor several participants considered sufficient to explain non-disclosure occurring in the vignette scenarios used in the survey, although many participants remained critical of non-disclosure on the whole. For example, one participant explained: “I support his decision not to make a status known on a dating app like this. I would however expect him to disclose before sex happened.”¹⁰¹ Similarly, another participant emphasised the stigma directed towards people living with HIV on mobile dating applications, as noted in Chapter 4, and suggested that this produced privacy concerns resulting in non-disclosure:

“I’d imagine that his decision to do so is based on fear of the stigma attached to a HIV diagnoses. I’d say that his decision not to include it is

⁹⁹ Participant 401353-401344-42037650

¹⁰⁰ Participant 401353-401344-43686850

¹⁰¹ Participant 401353-401344-43537049

his business, but if he was meeting someone, I'd feel he has a responsibility to tell them especially if asked directly about it. It could be seen as deceptive that he didn't tell them about it."¹⁰²

In accounts such as this, participants ultimately prioritise the sexual autonomy of the HIV-negative sexual actor over the right to privacy of the HIV-positive one. Similarly, privacy concerns were echoed by many participants who remained critical of non-disclosure but who understood the rationale behind the decision not to disclose:

- “He thinks it's irrelevant to mention since he can't pass it on. It's dishonest, but understandably a difficult thing for some people to share so openly.”¹⁰³
- “Having a positive status online (whether undetectable or not) can invite stigma. It's his right to do so, especially when he is aware of his status, however he should probably tell his hookup, even to inform the hookup of undetectable status if he isn't aware”.¹⁰⁴

However, the “right to know” continued to supersede the right to privacy, even where participants acknowledged the role of privacy and were conscious of the stigma directed towards PLWHIV:

The stigma still around it. Some people would get scared about the possibility of getting it even if [the HIV+ character] still explained about the undetectable viral load. If he wasn't planning on having sex with someone then that's fine. It is a very personal matter but the other person should know as well before hand if you do plan to have sex¹⁰⁵

The prioritisation of the right to know over the right to privacy is further evidence that the social construction of sexual autonomy and consent can result in sexual partners being positioned against one another,¹⁰⁶ and that people living with HIV more often than not are the disadvantaged party in this situation. Although the current legal framework on HIV transmission does not give full effect to this

¹⁰² Participant 401353-401344-42164399

¹⁰³ Participant 401353-401344-41531870

¹⁰⁴ Participant 401353-401344-40545646

¹⁰⁵ Participant 401353-401344-41514592

¹⁰⁶ Palmer (n 6) 12.

perceived “right”, unlike in gender identity cases,¹⁰⁷ it nevertheless frames the claim that there is a category of “material” facts about which sexual partners are entitled to know and inquire about.¹⁰⁸

5.3.2 The Fiction of “Materiality”

Historically, consent was not the driving force behind the criminalisation of sex, with offences such as adultery and sodomy existing where consent was a secondary factor.¹⁰⁹ The marital rape exception in England persisted until the mid-1990s, with earlier reforms addressing impersonation cases, it has been suggested,¹¹⁰ implicitly reinforcing the existence of the legal fiction that a man could not rape his wife. Furthermore, Herring suggests that the wrong in certain sexual consent cases is not inherently a lack of legal consent,¹¹¹ something which is certainly supported by the approach of the court in *Brown* and other cases.¹¹² The limits placed on consent appear rooted both in questions of policy, concerning what might be framed as the ‘public interest’,¹¹³ and morality and civic obligation,¹¹⁴ which I return to in the following chapter.

¹⁰⁷ *R v McNally* (n 2); Alex Sharpe, ‘Queering Judgment’ (2017) 81 *The Journal of Criminal Law* 417, 433 at para [34].

¹⁰⁸ Alex Sharpe, ‘The Ethicality of the Demand for (Trans)Parenthood in Sexual Relations’ (2017) 43 *Australian Feminist Law Journal* 161.

¹⁰⁹ See, for instance, Jed Rubenfeld, ‘The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy’ (2013) 122 *Yale Law Journal* 1372; Vera Bergelson, ‘Sex, Lies and Law: Rethinking Rape-By-Fraud’ in Chris Ashford, Alan Reed and Nicola Wake (eds), *Legal Perspectives on State Power* (Cambridge Scholars Publishing 2016).

¹¹⁰ Adrian Williamson, ‘The Law and Politics of Marital Rape in England, 1945–1994’ (2017) 26 *Women’s History Review* 382, 386–387.

¹¹¹ Jonathan Herring, ‘The Age of Consent in an Age of Consent’ in Chris Ashford, Alan Reed and Nicola Wake (eds), *Legal Perspectives on State Power* (Cambridge Scholars Publishing 2016) 81.

¹¹² *R v Brown* [1993] UKHL 19; Marianne Giles, ‘R v Brown: Consensual Harm and the Public Interest’ (1994) 57 *The Modern Law Review* 101.

¹¹³ *Baker* (n 94) 117.

¹¹⁴ Lindsay Farmer, ‘Civility, Obligation and Criminal Law’ in Daniel Matthews and Scott Veitch (eds), *Law, Obligation, Community* (Routledge 2018) 227.

As Cowan points out, the distinction in the approaches to consent taken in *Dica* and *Brown*, where in the former it was possible to consent to the risk of harm and in the latter it was not, are further complicated by the open communication between partners in *Brown* when contrasted with *Dica*.¹¹⁵ In *Dica*, Judge LJ distinguishes the case from *Brown* by limiting the issue of consent to the *risk* of infection.¹¹⁶ This not only produces contradictions between *Dica* and other case law, but is also problematic when looking at the internal logic of *Dica* as a whole. In order for the recklessness offence to transpire, transmission *must* have taken place; nevertheless, the courts artificially narrow the focus of consent to the issue of risk. Consent would not provide a defence were transmission to be intentional,¹¹⁷ even though the nature of the risks taken and awareness of these may remain the same. Cowan argues that this emphasises a legal fiction based on the normative position of some sexual activities, which distinguishes between non-normative sexual activities and those risks that “normal” sexual intercourse incurs, which may go some way to explaining the divergence between *Dica* and *Brown*.¹¹⁸

The continued prevalence of principles of disclosure linked to choice, self-autonomous personal control and the “right to know” in the context of legal discourse on consent highlights how consent, far from being a neutral concept,

¹¹⁵ Cowan, ‘The Pain of Pleasure: Consent and the Criminalisation of Sado-Masochistic “Assaults”’ (n 86) 9–11.

¹¹⁶ *R v Dica* (n 16) [53]-[58].

¹¹⁷ *R v Dica* (n 16) [58]; on the issue of intentional transmission, see Octavio Gonzalez, ‘Tracking The Bugchaser’ (2010) 75 Cultural Critique 82, among others.

¹¹⁸ Sharon Cowan, ‘Criminalizing SM: Disavowing the Erotic’ in RA Duff and others (eds), *The Structures of the Criminal Law* (Oxford University Press 2011) 67ff; and, also, Cowan, ‘The Pain of Pleasure: Consent and the Criminalisation of Sado-Masochistic “Assaults”’ (n 86); *R v Dica* (n 16) [47].

inherently privileges particular models of risk taking and personal autonomy.¹¹⁹ Bergelson highlights that individual autonomy may well be diminished by deception (and arguably non-disclosure) between sexual partners, as this does in some way limit the control one has over one's own life, but argues that there are compelling arguments against accepting that some facts are inherently "material" whilst others are not.¹²⁰ As I have noted above, the data here suggests that many application users see HIV status as material to consent decision making, giving rise to the perceived "right to know".

Archard, on material facts, suggests that in order for consent to be valid consent:

[T]he person consenting must be possessed of all the relevant material facts bearing significantly on the decision to consent. The person does not need to know everything, only everything that would make a real difference to whether or not she consented.¹²¹

However, how 'everything that would make a real difference' can be distinguished from "anything the person wishes to know" remains unclear. Rubenfeld, and Fischel, point out that if materiality, underscored by autonomy, is privileged in this manner then there is very little, if anything, that could be legitimately excluded from the scope of inquiry.¹²²

If materiality is taken to mean facts that would determine whether sex would take place or not,¹²³ then the fiction of materiality is highlighted by spacio-temporal limitations that the "right to know" and narrative of choice and control employ. As Palmer notes, these models of sexual consent are based on the premise that sex

¹¹⁹ Cowan, 'Offenses of Sex or Violence? Consent, Fraud, and HIV Transmission' (n 11).

¹²⁰ Bergelson (n 109) 163.

¹²¹ See David Archard, *Sexual Consent* (Westview Press, Harper Collins 1998) 40–46.

¹²² Rubenfeld (n 109) 1401–1402; Fischel (n 1) 101.

¹²³ Bergelson (n 109) 167.

can be separated into distinct acts which are easily distinguished and separated from one another, which ignores how sexual activity is co-produced.¹²⁴ This would arguably equate sexual activity to performance of a contract, with parties engaging in detailed negotiations on the requirements and limits of their consent, setting out specific conditions for their consent,¹²⁵ which arguably overlooks the role of emotion, passion and desire.¹²⁶ As Elliott and de Than note,¹²⁷ the Home Office explicitly rejected incorporating language perceived to be quasi-contractual in the *Setting the Boundaries* Report which preceded the 2003 Act.¹²⁸ If it is possible for consent to be conditional then it entails either resorting to this quasi-contractual model, where partners can raise any condition prior to sex which their partner is under an obligation to respond truthfully to, or otherwise it must resort to some standard of “reasonable” requests, which would entail normative judgments about the role and purpose of sex.

Archard suggests that mistaken consent cases can generally be categorised as unreasonable owing to the modest or minimal impact that clarification of the consent of the other might have on the party seeking clarification.¹²⁹ This would, in effect, enable consent to be made conditional upon any facts which the consenting party either specified, or which are to be considered expected in specified circumstances.¹³⁰ In the context of many forms of alleged “sexual fraud”,

¹²⁴ Palmer (n 6).

¹²⁵ Clough (n 1) 184.

¹²⁶ Ryan (n 8) 247; Palmer (n 6) 11.

¹²⁷ Catherine Elliott and Claire de Than, ‘The Case for a Rational Reconstruction of Consent in Criminal Law’ (2007) 70 *Modern Law Review* 225, 238.

¹²⁸ Home Office, ‘Setting The Boundaries: Reforming the Law on Sex Offences’ (Stationery Office 2000) para 2.10.5.

¹²⁹ David Archard, ‘The Mens Rea of Rape: Reasonableness and Culpable Mistakes’ in Keith Burgess-Jackson (ed), *A Most Detestable Crime* (OUP 1999) 220.

¹³⁰ For further discussion of ‘conditional consent’, see Clough (n 1).

including the criminalisation of HIV transmission, however, this argument carries with it significant limitations. It is not the case that, in Archard's words, there is 'no significant cost' to seeking clarification. Indeed, there may be significant costs in the form of immediate bodily harm.

In gender identity cases, fear of violence has been advanced as a potential explanation for non-disclosure, an explanation which the law fails to acknowledge.¹³¹ The same may be the case in instance of HIV non-disclosure,¹³² where people living with HIV may fear violent responses to disclosure, driven by the angry and emotive reactions to non-disclosure I have discussed. Furthermore, the reverse maxim may be true in HIV cases, in that it could be suggested that there are few gains from the act of inquiry other than the sating of curiosity or the absolute avoidance of contact with a person living with HIV. Arguably, neither of these benefit the HIV-negative in ways that justify the force of law. To prioritise curiosity over the right to privacy of those living with HIV would be manifestly unjust, undermining their personal autonomy and representing what Weait terms 'unwarranted interference and condemnation by the state'.¹³³ Although inquiry may facilitate safer sexual practices, it is disclosure of *transmission risk* (which the law does enforce) rather than HIV status alone which is critical to risk reduction. This argument might also have more merit if it were not open to individuals to insist upon preventative measures such as condoms in

¹³¹ Sharpe, 'The Ethicality of the Demand for (Trans)Parenthood in Sexual Relations' (n 108) 178–179.

¹³² Weait (n 5) 184; Barry D Adam and others, 'Impacts of Criminalization on the Everyday Lives of People Living with HIV in Canada' (2014) 11 *Sexuality Research and Social Policy* 39, 41; Eric G Benetsch and others, 'Misleading Sexual Partners About HIV Status Among Persons Living with HIV/AIDS' (2012) 37 *Journal of Community Health* 1049, 1054; Fadhila Mazanderani, 'An Ethics of Intimacy: Online Dating, Viral-Sociality and Living with HIV' (2012) 7 *BioSocieties* 393, 399–400; Young (n 90) 122.

¹³³ Weait (n 5) 183.

any event, if they are significantly averse to risk taking, or to discuss methods of prevention (rather than status disclosure alone) with their prospective partners.

5.4 Knowledge, Disclosure and Consent

In the early stages of the HIV/AIDS epidemic, then Secretary of State for Health and Social Services Norman Fowler agreed with the statement, made by the US Surgeon General, that: “*Information [concerning HIV/AIDS] is the only vaccine we have*”.¹³⁴ In the previous section, I highlighted how many, although not all, participants in this project spoke of a “right to know” a prospective partner’s HIV status. I challenged this “right to know” as unnecessary as a precondition for safer sex, in part, because it is open for those who are sexually active and HIV- to engage in safer sex (either through condoms or PrEP) without needing to know their partner’s serostatus. One potential limitation of this argument is that it assumes that the HIV- are informed about sexual health and HIV prevention. In this section, I examine how knowledge of HIV and HIV prevention were discussed in the responses. As noted in Chapter 2, the difference between the defendant’s knowledge of his HIV status and the complainants’ limited knowledge of HIV framed the defendant’s culpability in *Konzani*.¹³⁵ However, although many participants did construct the HIV- as unknowing and dependent upon the disclosure of the HIV+ as a source of information, I argue that this is a result of attribution of responsibility for HIV prevention rather than the actual distribution of knowledge.

¹³⁴ HC Deb, 21 November 1986, Vol 105, Col 801 (emphasis added).

¹³⁵ See Weait (n 5) 43–45 and Section 2.2.2.

5.4.1 Knowledge

Acquiring, maintaining and acting upon sexual health education information has been seen as critical since the emergence of HIV/AIDS in the 1980s. Avila suggests that modern sex education programmes, including those beyond the Spanish context of his research, continue to target men who have sex with men as particularly in need of HIV prevention education and intervention.¹³⁶ As the Hansard quotation above highlights, the role of sexual health education and knowledge has been at the centre of the cultural response to HIV/AIDS in the UK since the emergence of the epidemic. The notorious “Don’t Die of Ignorance” campaign placed an emphasis on knowledge and education in the 1980s, in a manner, it might be argued, now echoed by the disclosure and testing emphasis found on applications.

Burgess suggests that the ‘direct impact, significance and legacy of the “remarkable” “Don’t Die of Ignorance” campaign have been limited’ but that the shift towards the individualisation of risk and the moralistic imposition of responsibility that it encapsulated persists more broadly, particularly in public health policies.¹³⁷ Some research, particularly that by Young,¹³⁸ however, suggests that there is also a persistent cultural awareness of these campaigns, particularly upon the generations of gay men who saw them at the time. Those campaigns were not referenced by participants here, even by those who were

¹³⁶ Rubén Ávila, ‘Bareback Sex: Breaking the Rules of Sexual Health and the Assumption of Risks’ (2015) 18 *Sexualities* 523, 537.

¹³⁷ Adam Burgess, ‘The Development of Risk Politics in the UK: Thatcher’s “Remarkable” but Forgotten “Don’t Die of Ignorance” AIDS Campaign’ (2017) 19 *Health, Risk and Society* 227, 240.

¹³⁸ Ingrid Kristine Young, ‘Reimagining Risk: Exploring Understandings of Risk in Sexual Health amongst Gay and Bisexual Men in the North East of England’ (PhD Thesis, Newcastle University 2011) 106.

among age groups likely to have been exposed to those messages in the 1980s. However, the individualistic ethos of those messages can be seen more generally within the data, particularly where participants discuss disclosure obligations.

It is significant that although a majority of participants indicated a prior awareness of treatment as prevention, concerns about their own lack of understanding and a broader concern that men who have sex with men are underinformed about HIV transmission risk and sexual health more generally was seen across the data. For instance, one participant openly discussed being uninformed about HIV until learning about it through the diagnosis of a friend:

“The only reason I am aware that having an undetectable status means you can not pass on the HIV virus during sex is because my best friend was diagnosed as HIV Positive this summer. This was a total shock for him. I have been to every sexual health appointment with him and have supported him through this over the last 6 months. He is now undetectable, we have had protected sex in the past when he thought he was negative, and we have had sex since his undetectable status. Before I’d been through this experience, I would never ever ever of knowingly had sex with some with a HIV Positive diagnosis or who have an undetectable status. I did not know enough about it, so just avoided it completely, I didn’t want to take any unnecessary risk. I certainly was not clear what undetectable meant, and I didn’t realise there was no risk of passing it to a sexual partner.”¹³⁹

Other responses were not explicit, but included comments which signalled varying degrees of awareness, for instance: ‘[t]hey do not have HIV even if they may have in the past’¹⁴⁰. It was not uncommon for these responses to also suggest an expectation that prospective partners who were HIV positive were obliged not only to disclose their HIV status but also explain their status, HIV prevention and concepts such as U=U:

¹³⁹ Participant 401353-401344-41722354

¹⁴⁰ Participant 401353-401344-42535762

“To be honest I don't know much about HIV. I would ask them about it or Google it. It tells me that they are open about what they have.”¹⁴¹

Whilst, on the one hand, for the participant above, disclosure within the app profile reassured them that they could ask questions in this way, on the other hand, silence on the issue of HIV status concerned some participants, who felt that silence reflected a lack of awareness which might make discussion of sexual health challenging:

“[I]f [a partner doesn't] know, how am I to know? I can't make an informed sexual health decision based on the limited information provided. So I must to assume otherwise or asked hum sexual health questions to get the answers, but then they could be lies.... or they could just tell me what they want me to hear...”¹⁴²

The emphasis this response places on the prospective partner as *the* source of sexual health knowledge reflects the individualist approach to sexual health seen across much of the data. Although there are arguable justifications for all prospective sexual partners engaging in constructive discussion surrounding how to have sex safely, the extent to which this is often used to justify extensive obligations imposed on PLWHIV and the stigmatising behaviour of some HIV-negative individuals undermines these justifications.¹⁴³ Within this data, the extent to which lack of awareness and poor sex education might lead to stigma was often highlighted:

“Immoral of him go not mention it on profile but there is a negative stigma on HIV status and not a lot of people understand the terms[.]”¹⁴⁴

¹⁴¹ Participant 401353-401344-42096316

¹⁴² Participant 401353-401344-41722354.

¹⁴³ Scott Burris and Matthew Weait, 'Criminalisation and the Moral Responsibility for Sexual Transmission of HIV', *Third Meeting of the Technical Advisory Group on the Global Commission on HIV and the Law* (2013).

¹⁴⁴ Participant 401353-401344-40166180

It is perhaps significant that the participant here suggests that the obligation on the character is an ethical or “moral” obligation, rather than a legal one.¹⁴⁵ The participant appears to be sympathetic to the prevailing stigma present on these applications, something that was echoed in several responses. One participant suggested that non-disclosure in order to avoid stigma might be morally justifiable, but only if disclosure took place prior to a sexual encounter:

“If [the character has not disclosed due to] stigma, and to give him a chance to explain during chat - fair enough. - If [it is] so that he can satisfy a fetish of having unprotected sex with men whilst he has HIV - bad. - If privacy - fine. Basically, it all depends on whether he would volunteer that he is HIV positive before having sex, or would answer truthfully if asked.”¹⁴⁶

Given that the vignette this participant is discussing involved a character with an undetectable viral load,¹⁴⁷ statements such as this also indicate that some application users do not consider TasP an alternative to disclosure. The manner in which the participant frames condomless sex as unprotected stands in contrast to current public health messages,¹⁴⁸ but may reflect the attitudes towards safety discussed in Chapter 4. Similar responses spoke of non-reliance on disclosure, irrespective of status, with participants instead discussing strategies of safety they retained control over. Discussing the same vignette, another participant explained:

“I think [the character] is HIV positive, and his viral load was undetectable as to September 2018, the date of their last test. This would mean that, were we to have sex, he couldn't transmit the HIV virus. I don't have any reason to think he is lying, but if I had sex with him, I would rely on my strategies for self-protection, rather than on his disclosure about his HIV status.”¹⁴⁹

¹⁴⁵ The distinction between moral and legal responsibility is the central focus of Chapter 6, below.

¹⁴⁶ Participant 401353-401344-40159734

¹⁴⁷ See Section 3.4.5.

¹⁴⁸ British HIV Association, ‘BHIVA Endorses “Undetectable Equals Untransmittable” (U=U) Consensus Statement’ (12 July 2017).

¹⁴⁹ Participant 401353-401344-41482345

Whilst some statements such as this emphasise how participants drew upon their own 'strategies for self-protection', which included beliefs that 'safe sex is a must' irrespective of a partner's HIV status,¹⁵⁰ these strategies often involved compelling disclosure from HIV+ partners or expecting them to 'volunteer' this information, as the participant above suggests. The view that, despite the prevalent stigma seen on applications, those living with HIV had a responsibility to do this was often justified by the assumption that PLWHIV were more informed than the HIV-negative. Offering an explanation for non-disclosure, one participant stated:

"[The Character may be e]mbarrassed or afraid that people don't have enough information to make informed decisions about having sex with someone with HIV. I understand his reasoning as long as he discloses in advance of sexual interaction."¹⁵¹

As this participant exemplifies, PLWHIV were often expected to be acutely and accurately aware of their own transmission risk (or non-risk) as compared to HIV-negative characters where knowledge was unexpected. One participant, continuing the narrative of a scenario involving non-disclosure of an undetectable viral load explained:

"I think [the HIV- character] might be angry or Worried initially. He may feel he had been deliberately misled. He may not have decided to have sex with [the undetectable character] or meet him if he had know his status beforehand. But once Ari has explained what undetectable means he might be okay with it and his mind be put to rest[.]"¹⁵²

The emphasis this statement places on differing levels of knowledge and disclosure being necessary in order to allay the fears of HIV-negative people was a feature which stood out in several responses. Several participants distinguished

¹⁵⁰ Participant 401353-401344-41991164

¹⁵¹ Participant 401353-401344-43067383

¹⁵² Participant 401353-401344-41722354

between the HIV-negative character's awareness, stemming from general sex education, and the knowledge expected of the character with HIV:

"I would hope he would be honest, since he has had a medical professional give him the diagnosis of 'undetectable'. But I suspect that he would say negative as he is unable to pass the virus on and this would not have a derogatory impact on Charlie's choice whether or not to meet him."¹⁵³

The distinction drawn here between general knowledge and the knowledge provided by medical professionals may underpin, to some extent, the approach to knowledge and responsibility taken by the CoA in *Dica* and *Konzani*. As Weait sets out, there is a reasonable argument that those who engage in unprotected sex with a partner of unknown status *are*, by agreeing to have sex, consenting to the risk in that situation.¹⁵⁴ This approach was rejected by the Court of Appeal, who emphasised that 'to the extent that Clarence suggested that consensual sexual intercourse of itself was to be regarded as consent to the risk of consequent disease, again, it is no longer authoritative.'¹⁵⁵ The accounts of participants here suggest that many of the men who use dating applications similarly feel that HIV-negative men who have sex with men are insufficiently aware of transmission risks to properly consent to these risks, therefore justifying disclosure obligations.

However, whilst it might be suggested that this general awareness is insufficient to base duties to disclose or the right not to disclose upon, the more specific knowledge that comes along with application use and the presence of these features and associated testing reminders may yet undermine the CoA's

¹⁵³ Participant 401353-401344-42316129

¹⁵⁴ Weait (n 5) 179.

¹⁵⁵ *R v Dica* (n 16) [59].

approach in cases involving application use. Several participants did emphasise that these features may reinforce obligations to disclose, but also serve as a reminder to HIV-negative application users that they should be mindful of their sexual health irrespective of the declared status of their partners. Not only is this increasingly relevant as TasP results in the sites of the greatest risk shifting to those who are unaware of their status, rather than those who have been diagnosed,¹⁵⁶ it also serves to reinforce the arguments above that HIV-negative individuals can be made sufficiently aware of risks without disclosure taking place:

“I think that the test history section is useful to have shown as HIV is a big topic of discussion in the current climate. It makes people aware that they are responsible for themselves and make sure they are repeatedly getting tested and looking after themselves. However, it is also very easy to lie about these tests and dates and so should be taken with a pinch of salt.”¹⁵⁷

5.4.2 Disclosure

As Chapter 4 highlighted, participants’ accounts of disclosure were complex, often contradictory, and frequently emotionally charged. The stigma directed towards those who did disclose, and the anger directed towards those who did not, were interlinked with claims about the necessity of disclosure, towards which the perceived imbalance of knowledge, discussed above, further contributes. Because of this stigma, many participants expressed surprise that the HIV disclosure features were used to disclose statuses other than negative, but this public disclosure was often distinguished from disclosure in private:

“Disclosing your HIV status on an app where hundreds of other men can see you is scary. I personally would not disclose this information on a profile. I would tell the person privately, but not public-ally display it on an app. I think the reason Ari has not disclosed his status is fear of being

¹⁵⁶ Race, ‘Click Here for HIV Status: Shifting Templates of Sexual Negotiation’ (n 34) 8.

¹⁵⁷ Participant 401353-401344-41483556

judged and that he would not get attention from other men because most men (unfortunately) would turn their heads as soon as they saw a profile where it stated they were positive. I believe a lot of men are uneducated on the subject and as soon as they see 'positive' they turn the other way.”¹⁵⁸

As Roth describes, the cartography of dating apps is ‘constantly in flux [with] a community whose participants enter, interact, and exit at will.’¹⁵⁹ Statements such as the one above highlight how this visibility reinforces the distinctions between public and private disclosure, something which other participants discussed when addressing disclosure obligations:

“I'd imagine that his decision to do so is based on fear of the stigma attached to a HIV diagnoses. I'd say that his decision not to include it is his business, but if he was meeting someone, I'd feel he has a responsibility to tell them especially if asked directly about it. It could be seen as deceptive that he didn't tell them about it.”¹⁶⁰

As well as focusing on responsibility, this participant also explores what it means to be deceptive in this context. The participant’s distinction between (passive) non-disclosure and (active) deception demonstrates how participants’ perspectives on consent, noted above, shape the meaning given to deception. The foundation of the distinction the participant makes is the *active* role taken by the HIV-negative individual who inquires about a prospective partner’s HIV status. As Weait points out, the law’s response to HIV is marked by a ‘linear and unidirectional approach to causation’.¹⁶¹ The non-disclosure of someone living with HIV is constructed as central to the inability of the HIV-negative to remain HIV-negative, and as a result infection is positioned as something that would not

¹⁵⁸ Participant 401353-401344-40168692

¹⁵⁹ Yoel Roth, ‘Zero Feet Away: The Digital Geography of Gay Social Media’ (2016) 63 *Journal of Homosexuality* 437, 442.

¹⁶⁰ Participant 401353-401344-42164399

¹⁶¹ Weait (n 5) 187.

have happened but for the non-disclosure.¹⁶² There is a clear contrast between this position and the expectations discussed by participants such as the one above. Whilst, in law, both deception and non-disclosure are central to HIV transmission, in these accounts, only *deception* impedes the ability of the HIV-negative to remain so.

Other participants emphasised that disclosing information within the profile was not the default position and was, in essence, an active process and that non-disclosure is, in practice and in the design of these applications, the default:

- “He doesn't have to. If there is no risk to other people he does not have to actively offer this information. There is still a stigma attached to being HIV+ so I can understand his reasons for not telling displaying this information publically.”¹⁶³
- “No thoughts from that / a lot of people can't be bothered completing that”¹⁶⁴
- “Honest about the HIV status. I don't think a lot of people add that information.”¹⁶⁵

These responses demonstrate that although many participants considered HIV status important to their decisions around consent, HIV status disclosure is not expected or anticipated by all. It is also notable that none of these responses frame a positive HIV status as exceptional in the context of application use. It has been suggested that the exceptional nature of HIV infection justifies disclosure obligations and undermines claims that the HIV-negative hold some responsibility relating to disclosure. Mawhinney argues, for instance, that because those living with HIV ‘differ from the norm’, responsibility for disclosing their status rests with

¹⁶² Weait (n 5) 188.

¹⁶³ Participant 401353-401344-41613134

¹⁶⁴ Participant 401353-401344-42322573

¹⁶⁵ Participant 401353-401344-42640038

them alone.¹⁶⁶ Indeed the perceived exceptionalism of HIV-positive bodies may contribute to the lack of clarity between active/passive deception distinction,¹⁶⁷ by suggesting that ‘presenting oneself for sexual union carries with it an implied representation that one is free from sexually transmitted disease or that one is unaware that one has such a disease’.¹⁶⁸ This data would appear to challenge that claim, highlighting that serodiversity is an accepted reality for many application users and HIV-negativity is not understood as the norm by all users, or even by all HIV-negative users.

Several other participants emphasised that not only was HIV-positivity unexceptional, it was also considered unimportant. In part, this lack of importance was often because participants’ understanding of “safe” sex extended beyond the risks of HIV:

“If it was me, it wouldn't change my reaction because I know U=U. However, I would not have unprotected sex because of other STIs.”¹⁶⁹

And, similarly:

“Pleased they have felt able to disclose their status, but still aware of the risks of other STI transmission.”¹⁷⁰

Many concerns regarding other STIs were unconnected with participants’ discussion of HIV status and disclosure. However, concerns such as those discussed in the previous chapter, including statements suggesting that PLWHIV were promiscuous and “bad at prevention”, are counter to this view. These beliefs

¹⁶⁶ George R Mawhinney, ‘To Be Ill or to Kill: The Criminality of Contagion’ (2013) 77 *The Journal of Criminal Law* 202, 203.

¹⁶⁷ For further discussion of the active/passive distinction, see Ryan (n 68).

¹⁶⁸ Adrian Lynch, ‘Criminal Liability for Transmitting Disease’ (1978) 612 *Criminal Law Review* (as cited in Ryan (n 68) 17).

¹⁶⁹ Participant 401353-401344-40159893

¹⁷⁰ Participant 401353-401344-40170291

position HIV-positive statuses as a 'spoiled identity' persisting even when transmission risk is eliminated.¹⁷¹ Several participants suggested that disclosure of a positive status was an implicit signal that someone on an application was seeking a sexual encounter or was generally sexually promiscuous:

"The fact that he is single, HIV positive points towards sexual meetings (definitely this is not sure but thats what pops to my mind)."¹⁷²

Another participant similarly commented:

"The specification that he travels about a lot & wants to meet new people suggests to me he was random no strings attached fun whilst he is away. But he is also after chat, friends, dating & a relationship when he's at home however doesn't want to come across overtly as a "slag" to potential partners. He also wants people who he can have a sexual relationship with - otherwise probably wouldn't mention his HIV status."¹⁷³

Race suggests that the law contributes to 'an "affective climate": a shared context of fear, shame, secrecy, suspicion, rejection and avoidance' within which responsibility for preventing HIV transmission rests only or primarily with PLWHIV.¹⁷⁴ Responses such as these demonstrate that disclosure can take on a particularly sexualised meaning when it takes place within application profiles, offering additional rationales for non-disclosure. This arguably contributes to the affective climate and is overlooked by a legal framework which focused on the act of non-disclosure and prioritises particular forms of sexual responsibility.¹⁷⁵

¹⁷¹ See Asha Persson, 'Non/Infectious Corporealities: Tensions in the Biomedical Era of "HIV Normalisation"' (2013) 35 *Sociology of Health and Illness* 1065, 1068; and, also, Erving Goffman, *Stigma: Notes on the Management of Spoiled Identity* (Penguin 1963).

¹⁷² Participant 401353-401344-42768685.

¹⁷³ Participant 401353-401344-43683239.

¹⁷⁴ Kane Race, 'Framing Responsibility: HIV, Biomedical Prevention, and the Performativity of the Law' (2012) 9 *Journal of Bioethical Inquiry* 327, 331ff.

¹⁷⁵ See Ch 6.

5.4.2.2 A Question of Attribution

The normative position of HIV-negativity was also arguably demonstrated in several accounts that addressed the third mock profile, which intended to highlight the complexity of a profile purporting to represent more than one person. Although several participants expressed uncertainty surrounding this profile, as I will outline below, there was very little by way of surprise over the content of the profile. Although firmly a minority practice, a, nevertheless significant minority of application users report using a shared profile in certain instances,¹⁷⁶ and the lack of surprise here may further support claims that shared profiles are not rare or abnormal.

When discussing the profile, several participants expressed general uncertainty regarding information in “shared” profiles purporting to represent more than one person. Participants often commented that if they interacted with the users of such profiles, they would aim to clarify the situation when communicating directly with them. Despite this, there were also some general expectations through several responses which are worth highlighting, particularly where relating to the inclusion of HIV status in these profiles.

Firstly, responses often expressed an expectation that *shared* profiles were, nevertheless, *controlled* by only one user:

- “To me the shorter person in the photo due to it matching his height. I find it’s usually the older man running the account.”¹⁷⁷

¹⁷⁶ Kathryn Macapagal and others, ‘Geosocial Networking App Use Among Men Who Have Sex With Men in Serious Romantic Relationships’ (2016) 45 Archives of Sexual Behavior 1513.

¹⁷⁷ Participant 401353-401344-40158345

- “I don’t think it’s as complex as you imply. Whoever is the more active user of the profile in the pair (and thus probably made it) would have their details included.”¹⁷⁸
- “They’re probably both somewhere around those figures - probably these are the stats of the person who wrote the profile, but the other guy is near enough.”¹⁷⁹

As a form of location-aware software, dating applications are designed to be accessed from a single device, in a single location, at any given moment. Consequently, many applications log a user out on one device if they log in on another. It is, therefore, unsurprising that many participants expected there to be an ‘active user’ in primary control of each profile. As demonstrated in the excerpts above, there were various intuitions regarding which of the two people in the profiles picture was the one actively managing the account, with some participants seeing the situation as reasonably unambiguous. However, this expectation was far from universal:

“I assume this information has been from the user setting up the profile, they have either put the information in which matches their description or they may have put average information on which relates to both of the users. [T]here is also question as to whether the other user is in agreement for their photo/details to be disclosed.”¹⁸⁰

In this account, the participant speaks of the information in the profile reflecting the details of the person who created the profile, but also suggests that some information might reflect an average or middle ground between the two. They also point out that there are also potential privacy concerns surrounding the use of shared profiles, including the extent to which the “secondary” user is aware and consenting to their inclusion in the profile. The suggestion that an average of

¹⁷⁸ Participant 401353-401344-40839887

¹⁷⁹ Participant 401353-401344-40498377

¹⁸⁰ Participant 401353-401344-42413617

some sort might be achieved echoes the accounts above, which indicated that a compromise might be achieved, and several other responses: 'I would imagine they take a sort of average between the two of them.'¹⁸¹

However, other participants discussed the difficulty of compromise or averaging in relation to HIV status, leading to several participants suggesting that whilst other information could be presented in this way, HIV status could not:

"I would assume that both partners are negative. But I would check this out. My assumption is based upon the fact that they would disclose a positive status if either person was[.]"¹⁸²

Accounts such as these highlight the extent to which HIV-negativity is assumed as the default position by many who use dating applications. It also reflects the difficulties inherent in representing something as potentially complex as HIV status within the limited confines of an application profile. Whilst this stands out in instances of shared profiles, as the data here would appear to suggest, this is only one example of the limits of applications as a disclosure tool. It also suggests that distinct standards of attribution, cohesiveness and consistency apply to HIV status on apps. Whilst compromise and averaging may appear acceptable in relation to other information, these accounts suggest that application users expect HIV status disclosure to take place clearly, unambiguously and overtly within profiles.

¹⁸¹ Participant 401353-401344-43683239

¹⁸² Participant 401353-401344-43537049

5.4.2.3 The Adequacy of Disclosure

Given the extent to which indirect and non-verbal forms of disclosure of HIV are a contentious issue within contemporary legal debate,¹⁸³ whether disclosure within a profile is adequate to discharge the duty of disclosure is a complex question. In Chapter 4, I discussed how participants often framed HIV disclosure as essential in order to overcome the uncertainty surrounding risks relating to HIV and to enable them to feel in control of their own safety. I also pointed out that, for many participants, disclosure was perceived to be a red flag for risky sexual practices. Building on this analysis, in this section I discuss how disclosure was framed as adequate or inadequate, in part as a result of these approaches to risk and safety. I demonstrate how the necessity of disclosure in order to achieve “safety” often stems from a lack of knowledge regarding TasP or anxieties about the efficacy of TasP on the part of the HIV-negative. Consequently, I argue that the (in)adequacy of disclosure taking place via mobile applications is driven by the perceived exceptionalism of the HIV-positive, the “safety” behaviours of the HIV-negative, and the sexualised context of mobile dating application use, rather than by what is necessary in order to enable safer sex.

The significant importance attached to disclosure by participants and the anxieties surrounding sexual health, discussed above, make it somewhat unsurprising that the standards of disclosure mentioned by participants were relatively high. Beyond the expectation that disclosure was *essential*, some

¹⁸³ Lisa Cherkassky, ‘Being Informed: The Complexities of Knowledge, Deception and Consent When Transmitting HIV’ (2010) 74 *The Journal of Criminal Law* 242; David Hughes, ‘Did the Individual Consent to the Risk of Harm? A Comparative Jurisdictional Analysis of Consent in Cases of Sexual Transmission/Exposure to HIV’ (2018) 82 *The Journal of Criminal Law* 76; Ryan (n 68).

participants explicitly rejected alternatives to disclosure such as TasP. In some instances, such as this example, this rejection was linked to the participant's lack of knowledge regarding TasP:

“I lack knowledge on an 'undetectable' status, however it should always be communicated to potential sexual partners. I think he has not completed this as it would put most men off wanting to meet him.”¹⁸⁴

This participant's lack of knowledge contrasts with the relatively high levels of awareness among participants. Three quarters of participants reported prior awareness, with several more explaining that they had some knowledge but remained uncertain. However, even among this majority, there was concern that different meanings could be applied to “undetectable” and cast doubt over the efficacy of TasP as a whole:

- “People view undetectable in many different ways, too hard to say”¹⁸⁵
- “I would be worried by this. I do not really understand the various HIV diagnoses and it is certainly an issue for me. It's hard to clarify these things on an app like this”¹⁸⁶
- “Not sure what undetectable hiv means, maybe he's not choosing to disclose?”¹⁸⁷

There is a clear sense of uncertainty within these responses which highlights how disclosure may be misinterpreted or misunderstood. This does not necessarily mean that disclosure of an undetectable viral load alone is to be framed as inadequate: indeed, even when misunderstood some may understand it to communicate an absence of risk. However, the worry expressed by the second participant and the general concern seen in these responses do suggest that

¹⁸⁴ Participant 401353-401344-42413617

¹⁸⁵ Participant 401353-401344-40167755

¹⁸⁶ Participant 401353-401344-41560581

¹⁸⁷ Participant 401353-401344-43612383

disclosing an undetectable viral load may be framed as inadequate in certain contexts. Given, as I highlighted above, that the HIV-negative continue to be constructed as unknowing and the HIV-positive as a source of information regarding transmission risk, the very uncertainty which results in disclosure being ineffective may be leveraged to sustain more stringent disclosure obligations.

Similarly, participants' understanding of the purpose and meaning given to the "Test History" feature where individuals disclosed an undetectable viral load was often uncertain:

- "I don't know if there's some kind of separate test after testing as positive to check that the meds are working and that you're undetectable. so maybe he only got a positive test result as recently as September."¹⁸⁸
- "Undetectable suggests to me they are HIV+ and have an undetectable viral load. However, in light of that, I have no idea what the test history date might mean. Unless, he has misunderstood the meaning of the 'undetectable' in this context."¹⁸⁹

Although HIV arguably continues to be framed as an exceptional health concern, HIV prevention through testing and treatment sits alongside broader public health campaigns and those relating to other specific sexually transmitted infections.¹⁹⁰ HIV testing often takes place alongside tests for other STIs; however, it has been suggested that there is a 'variability' over which tests are offered across England.¹⁹¹ The doubt that the two responses above demonstrate may be

¹⁸⁸ Participant 401353-401344-41917008

¹⁸⁹ Participant 401353-401344-40163650

¹⁹⁰ See, for instance, the 'Long Time No Syphilis' campaign, developed in partnership with, among others, HIV Scotland: 'Long Time No Syphilis' <<https://www.longtimenosyph.info>> accessed 9 September 2020.

¹⁹¹ Health and Social Care Committee, *Sexual Health: Fourteenth Report of Session 2017-2019* (2017-2019, HC 1419) 27.

indicative of this variability in testing provisions, a point made explicitly by another participant:

“My thoughts are this is someone who is HIV positive and has an undetectable viral load. Their test history suggests they keep an eye on their sexual health regularly. Though to what extent is anyone’s guess. As test can mean anything from a pee sample to full blood works”.¹⁹²

One of the aims of the fourth vignette was to elicit discussion of the relationship between the test history feature and the HIV disclosure feature. As these features were introduced at the same time on many applications, it is perhaps unsurprising then that many participants considered the meaning ascribed to each of them to be interrelated:

- “The assumption is always that test refers to HIV”¹⁹³
- “The assumption is that test refers to HIV status, not STI status”¹⁹⁴
- “Because that’s an HIV status box, not a ‘generic STI’ box.”¹⁹⁵

As these responses demonstrate, although participants were often aware of the range of sexual health screening services that “testing” might include, a more specific meaning was often given to the “test history” feature, in part because it was seen as part of the “HIV status box”.

Whilst this perception limits what test history is taken to represent, it can also have an influence on perceptions relating to the HIV disclosure feature, as one participant explained:

“I believe the test history section tells you when the individual was last tested as being positive and undetectable. In otherworlds, this individual

¹⁹² Participant 401353-401344-43004560

¹⁹³ Participant 401353-401344-42628211

¹⁹⁴ Participant 401353-401344-43537049

¹⁹⁵ Participant 401353-401344-40498377

monitors and keeps up to date their status in regards to detectability. I have dated someone who was undetectable previously, I definitely had some concerns and needed some education and reassurance in regards to this".¹⁹⁶

In this response, the participant discusses the importance of disclosing testing history when also disclosing an undetectable viral load. This appears critical to establishing that viral load can be trusted and conforms with the cyclicity of safety discussed in Chapter 4, highlighting the decreasing value of an undetectable viral load test over time. This suggests that disclosure is only understood as effective and adequate when it is indicative of a broader effort on the part of the HIV+ to reduce or eliminate transmission risk. The response also highlights how disclosure is seen to contribute to the incremental development of HIV-related knowledge through lived experience over time. In light of the perception that the HIV-negative are underinformed about HIV (and sexual health more broadly), this further demonstrates why disclosure is seen as important by many participants, even where it does not directly contribute towards risk reduction. Indeed, it could be suggested that this construction of disclosure as education contributes towards a broader risk reduction over time, as the HIV-negative become more aware of transmission risk. But I would challenge any claim that this places any disclosure obligations on the HIV-positive, who should not shoulder the burden of public health education purely in consequence of their HIV status.

Although many participants gave weight to disclosed test history as an indicator of safety and transmission risk, trust in this disclosure does not appear to be

¹⁹⁶ Participant 401353-401344-43061371

consistent. Indeed, several participants suggested that this component of profiles was particularly prone to falsification or general unreliability:

“The test history is not reliable at all, this user may or may not have been tested and may have just put in a random date to fill the section[.]”¹⁹⁷

More broadly, whilst many participants were inclined to believe disclosure taking place via applications, many participants also stated that this disclosure did not influence their general attitudes towards sexual health or was not to be relied upon. Compare, for example, the attitude of a participant who stated:

“I notice [the character] has disclosed an undetectable status, which I believe to be true. This makes me more likely to trust his profile info. [...] I would tend to believe his status as it's a big decision to disclose such info. I don't put much trust in test history, I know people who just change that date every couple of months to appear healthy.”¹⁹⁸

with responses where participants stated that ‘I never trust what they write about HIV or Test History’¹⁹⁹ and ‘[w]ell people can lie on this things, if i am going to meet him, i'll be careful and use protection.’²⁰⁰

Each of these responses expresses doubt over “Test History” dates, in particular, but there is a contrast between them in relation to HIV status disclosure. The former highlights how the perpetual cycle of safety can influence disclosure and deception practices by creating a pressure to ‘appear healthy’. The latter highlights a distinction between *believing* and *relying* upon disclosure. The final response, above, highlights how disclosure can have little impact on their own safety strategies, because those strategies involve practicing safer sex irrespective of the HIV status of their partners. Some have pointed out that these

¹⁹⁷ Participant 401353-401344-42413617

¹⁹⁸ Participant 401353-401344-42532460

¹⁹⁹ Participant 401353-401344-42505942

²⁰⁰ Participant 401353-401344-42204861

strategies are often only employed with casual sexual partners and then disappplied with partners that men trust.²⁰¹ Within the scope of this project, which looked at disclosure practices as they took place via mobile dating applications' dedicated sexual health sections, it was not possible to capture all behaviour of this kind. However, several participants did reflect on the specificity of disclosing via an application profile. In keeping with the belief in disclosure noted above, others emphasised that disclosure was unusual and often unexpected:

“Status is irrelevant, I would only bother looking at it if it was a profile I was really interested in in other respects. I've never seen someone list their test dates, that seems bizarre and somewhat obsessive. If I saw this on a profile it would make me think the person had negative thoughts about HIV and was desperate to show they don't have it. Somewhat stigmatising.”²⁰²

Whilst this participant constructs HIV disclosure itself as unusual and unexpected, this was a minority view within the data. Most responses indicated that HIV disclosure was normal within the context of application use, although not always expected because of stigma and other attitudes seen here in the data. The HIV specificity of the sexual health features seen on the dating applications investigated here was noted in several responses discussing the fourth vignette (“History”) which presented participants with a narrative involving gonorrhoea. Several participants expressed doubt that a gonorrhoea diagnosis would be discussed within an application profile, with one participant explaining:

“Never in several several years of using the app have I seen someone declare anything other than HIV in their profile.”²⁰³

It is notable that the specificity of these disclosure expectations contrasts with the broader interpretation of the “all clear” discussed in the previous chapter.

²⁰¹ Robinson (n 35).

²⁰² Participant 401353-401344-42628211

²⁰³ Participant 401353-401344-42790768

Although the importance and desirability of disclosure was pervasive across the responses, any trends relating to expected behaviour were less clear and often more context-dependent. For instance, the perceived peculiarity of gonorrhoea disclosure within an application profile may contribute towards the belief that disclosure within an app profile would be adequate in those instances, which contrasts with the doubts raised about disclosing an undetectable status noted above:

“No. If he mentions [the gonorrhoea diagnosis] on his profile, I do not think he would mention it again. The assumption would be the potential partner would have read the profile prior to messaging.”²⁰⁴

5.4.2.3 To Disclose, or Not To Disclose, that is the Question

In this section, I have observed that the meaning, scope and adequacy of disclosure on mobile dating applications varies significantly among application users, whilst also being driven by the HIV-centric nature of disclosure features. The responses discussed above indicate that the perceived imbalance of HIV-related knowledge and the mixed meanings given to disclosure both contribute to an ‘affective climate’,²⁰⁵ where disclosure is often understood as necessary and yet insufficient to address the concerns of some who are HIV-negative. Arguably, the design of applications fails to address this climate and reduces disclosure down to a dichotomous state, failing to reflect the nuanced and complex experiences of HIV-positive and HIV-negative application users. As discussed in Chapter 4, there is a tendency among some HIV-negative men to construct risk as an externality associated with non-disclosure and limited

²⁰⁴ Participant 401353-401344-43686850

²⁰⁵ Race, ‘Framing Responsibility: HIV, Biomedical Prevention, and the Performativity of the Law’ (n 174) 331ff.

discussion of sexual health issues. However, as seen throughout this section, the disclosure of HIV and other sexual health information are often not relied upon when men practice their own “safety” driven behaviours. Instead, the uneven distribution of knowledge and the necessity of disclosure is employed as part of a discourse of consent which positions HIV-negative individuals as implicitly unaware and places ethical obligations upon PLWHIV to disclose their status, even where this disclosure is secondary to safety practices. The consequences of this may be significant, particularly in the context of criminal proceedings where disclosure and non-disclosure on applications may be evaluated outside of the specific context in which it occurs.²⁰⁶

5.5 Concluding Comments

Fischel claims that many of the values underpinning consent – such as sexual fulfilment, respect and enthusiasm for sexual encounters – are valid and compelling, but should be advocated for beyond the ‘small, legalistic box of consent.’²⁰⁷ Similarly, Brooks argues that the separation of the legal construction of consent from the context in which consent takes place means that the law is unable to fully respond to social conditions that shape sexual violence.²⁰⁸ In this chapter, I have demonstrated how concepts such as trust, knowledge and “the right to know” are critical to the social context of mobile application use.

²⁰⁶ John Danaher, ‘Could There Ever Be an App for That? Consent Apps and the Problem of Sexual Assault’ (2018) 12 Criminal Law and Philosophy 143.

²⁰⁷ Fischel (n 1) 18.

²⁰⁸ Victoria Brooks, ‘Greer’s “Bad Sex” and the Future of Consent’ [2019] Sexuality & Culture.

I have sought to explicitly challenge the categorisation of certain facts as “material” to consent decisions, particularly the materiality of HIV status, both from a legal and an ethical perspective. Disclosure and consent, as with sexual responsibility – the focus of the next chapter – are employed as a particular kind of legal fiction in HIV criminalisation cases, ones which sustain the uneven distribution of duties and disclosure obligations, as well as responsibility for preventing further HIV transmission. This positions sexual actors as inherently individualistic and ignores how sexual fulfilment is a cooperative endeavour.

This contractual, conditional approach to consent, which “materiality” is based upon, is likely to have an appeal owing to the manner in which it employs a particular framework of responsibility, one which is likely co-produced by/producing cultural narratives relating to sex, sexuality and sexual health.²⁰⁹ Included in this are narratives which construct the HIV-negative as uninformed and disclosure as a moment of education. The dichotomies of material and immaterial, informed and uninformed, trusting relationships and those with an absence of trust, are all potent narratives which “legalistic box[es]” may be prone to further oversimplify. As with other mobile applications designed to capture distinct declarations of consent, the disclosure features seen on applications may reinforce these dichotomies in the course of criminal proceedings. As Danaher argues in relation to these other “consent” apps, the additional weight that juries might give to permanent digital information over, for instance, first-hand testimonial accounts remains a compelling argument in favour of limiting the use of application evidence at trial.²¹⁰ The influence of these applications is unlikely

²⁰⁹ Palmer (n 6).

²¹⁰ Danaher (n 206).

to be mitigated through judicial directions alone because the appeal of evidence of this kind is that it aids in resolving what is otherwise one of the most contentious issues a jury can deliberate.²¹¹

²¹¹ See, for instance, Emily Finch and Vanessa E Munro, 'Breaking Boundaries? Sexual Consent in the Jury Room' (2006) 26 *Legal Studies* 303.

Chapter 6: Legal, Social, and Moral Responsibilities

6.1 Introduction

In Chapter 1, I pointed out that the social functions of the criminal law necessarily link it to normative social and contextual practices associated with the behaviours it is called upon to address and adjudicate.¹ One consequence of this is that ‘moral ideas about responsibility are absorbed into the law, and the law influences the way people think about responsibility in the moral domain.’² Discussing the relationship between moral and legal responsibility, Farmer argues that as well as importing basic moral concepts into the law:

[R]esponsibility in the narrower sense of liability is also fundamentally linked to the establishment of wider responsibilities (or obligations) in the criminal law. These impose obligations or duties on individuals (as legal persons) in general, or in relation to particular roles, such that the function of the criminal law is not simply that of prohibition.³

Farmer goes on to claim, with HIV criminalisation as a paradigmatic example, that these deployments of responsibility establish and reinforce links between social obligations of civility and criminal responsibility to the extent that, although the law may not criminalise all uncivil conduct, it does reinforce the legitimacy of these obligations.⁴ To this extent, it might be suggested that the law establishes expectations surrounding disclosure of HIV which position the knowledge of HIV among PLWHIV as a *burden*. Knowledge as a burden; in contrast to knowledge as capital or resource, is discussed by Valverde – who highlights how a “duty to

¹ Victoria Brooks, ‘Greer’s “Bad Sex” and the Future of Consent’ [2019] *Sexuality & Culture*.

² See Peter Cane, *Responsibility in Law and Morality* (Hart 2002) 15–16.

³ Lindsay Farmer, ‘Civility, Obligation and Criminal Law’ in Daniel Matthews and Scott Veitch (eds), *Law, Obligation, Community* (Routledge 2018) 226.

⁴ Farmer (n 3) 227.

know” can arise in relation to certain pieces of knowledge which the law presumes are, in a manner, “common sense”.⁵

Similarly, in the previous chapter, I demonstrated that the perceived imbalance of knowledge between the HIV+ and HIV- was deployed by some participants to justify and reinforce disclosure obligations. These responses reflected the belief that those living with HIV were more informed and, consequently, more responsible for raising and carrying out HIV prevention.⁶ Whereas in the previous chapter this analysis was framed around disclosure obligations and consent, in this chapter I focus on how these concepts relate to discussions of responsibility. I explore participants’ accounts of social and sexual responsibility within the data and the limited discussion of the law relating to HIV transmission, as well as legal concepts such as intent, passivity and obligations, drawing upon literature addressing the philosophy of criminal law and literature on responsabilisation.⁷

Chan and Reidpath argue that responsabilisation discourses draw direct association between individual agents and safety and health at a population level, based on assumptions about risk taking and decision making that do not account for individual circumstances.⁸ In Chapter 2, I highlighted how this influences

⁵ Mariana Valverde, *Law’s Dream of a Common Knowledge* (Princeton University Press 2003) 169–172, 190–192; and, also, Joachim J Savelsberg, ‘Law’s Dream of a Common Knowledge (Review)’ (2006) 31 *The Canadian Journal of Sociology* 270.

⁶ For discussion of this claim in legal literature, see Lisa Cherkassky, ‘Being Informed: The Complexities of Knowledge, Deception and Consent When Transmitting HIV’ (2010) 74 *The Journal of Criminal Law* 242, 245; George R Mawhinney, ‘To Be Ill or to Kill: The Criminality of Contagion’ (2013) 77 *The Journal of Criminal Law* 202, 203.

⁷ Susanna Trnka and Catherine Trundle, ‘Competing Responsibilities: Moving Beyond Neoliberal Responsibilisation’ (2014) 24 *Anthropological Forum* 136.

⁸ Kit Yee Chan and Daniel D Reidpath, “Typhoid Mary” and “HIV Jane”: Responsibility, Agency and Disease Prevention’ (2003) 11 *Reproductive Health Matters* 40.

discourse on HIV prevention and “vectors” of disease transmission.⁹ In criminal law, this is also reflected in the ‘moral-philosophical framework which takes the responsible agent as the foundational unit of analysis’.¹⁰ Responsibilisation’s restricted understanding of our social interdependency, and the prioritisation and protection of ‘equal autonomous rights-bearing selves from harm by each other and the state’,¹¹ results in the suggestion that ‘[t]hose who “knowingly” place others at risk are to be blamed for their irresponsibility or judged irrational in their decision making’.¹² Responsibilisation consequently underpins the legal process, by providing a foundation upon which *individuals* are held accountable.¹³

In the context of HIV transmission, intertwined with discourses on responsibility is the pervasive figure of the Other of HIV/AIDS, which is itself dependent upon the externalisation of risk, as discussed in Chapter 4.¹⁴ Although the prominence of the cultural association between the Othering of PLWHIV and sexual transmission of the HIV virus is significant, the extent to which the Other and Stranger of HIV can also be viewed in relation to intravenous drug use, seen, for example, by Zigon in some international literature, is also noteworthy.¹⁵ Responsibilisation in HIV prevention terms can be seen in the attempts to manage those failing to abide by the ‘good citizenship-tamed, “responsible”...

⁹ See Section 2.5, above, and Heather Worth, Cindy Patton and Diane Goldstein, ‘Reckless Vectors: The Infecting “Other” in HIV/AIDS Law’ (2005) 2 *Sexuality Research and Social Policy* 3.

¹⁰ Matthew Weait, *Intimacy and Responsibility: The Criminalisation of HIV Transmission* (Routledge-Cavendish 2007) 199.

¹¹ Jennifer Nedelsky, *Law’s Relations: A Relational Theory of Self, Autonomy, and Law* (Oxford University Press 2012) 5.

¹² Chan and Reidpath (n 8) 43 (citations omitted).

¹³ Trnka and Trundle (n 7).

¹⁴ Weait, *Intimacy and Responsibility: The Criminalisation of HIV Transmission* (n 10) 129–130.

¹⁵ Jarrett Zigon, “*HIV Is God’s Blessing*” (University of California Press 2011) 25–28.

safe sex ethic' driven self-responsible model of sexual responsibility.¹⁶ In light of this, the construction of HIV risk as external – as highlighted in the chronotope of risk discussed in Chapter 4 – and of HIV-negative men as vulnerable to deception on the part of PLWHIV has, it is argued, resulted in the deployment of cultures of surveillance and suspicion, seen, for instance, in several high profile sexual health campaigns.¹⁷

Building on this literature, this chapter argues that the inconsistent and sometimes contradictory ways in which participants discussed responsibility for preventing HIV transmission can be analysed through the lens of responsabilisation and that this reveals significant challenges for the use of mobile dating application evidence in criminal proceedings. It, furthermore, argues that the mixed legal and non-legal understandings relating to HIV transmission prevention and status disclosure result in the criminal law reinforcing and, in some instances, contributing to the production of, what are perceived to be, moral and ethical obligations to disclose HIV status. These perceived obligations, subsequently, shape how disclosure and non-disclosure are both constructed as active, rather than passive, processes. It concludes that this formation of sexual responsibility is neither objective nor necessarily helpful in efforts to reduce HIV transmission or achieve sexual justice.

¹⁶ Barry D Adam, 'Infectious Behaviour: Imputing Subjectivity to HIV Transmission', *Reframing Infectious Diseases Conference* (2006) 6–9; see also Niels van Doorn, 'Treatment Is Prevention: HIV, Emergency and the Biopolitics of Viral Containment' (2013) 27 *Cultural Studies* 901, 916–917; and, Vanessa E Munro, 'Shifting Sands? Consent, Context and Vulnerability in Contemporary Sexual Offences Policy in England and Wales' (2017) 26 *Social & Legal Studies* 417, 431–432.

¹⁷ See discussion of the 'Trust Him?' campaign in Octavio R González, 'HIV Pre-Exposure Prophylaxis (PrEP), "The Truvada Whore", and The New Gay Sexual Revolution' in Ricky Varghese (ed), *Raw* (Zed 2019).

In the next section, I discuss how the construction of responsibility in participants' accounts is centred around disclosure and the "right to know" discussed in Chapter 5. Expanding on the arguments made in that chapter, here and in the third section, I explore how disclosure obligations are framed as *rational* and *responsible* due to how they enable independent and autonomous individuals to make "reasonable" sexual safety decisions. Following this discussion, I address participants' accounts of the moral and legal responsibility to disclose HIV status, engage in safe sex, and prevent HIV transmission. I demonstrate that although legal knowledge was limited, where participants did draw on legal concepts these had a significant influence on concepts such as sexual responsibility and disclosure. In the final substantive section, I return to the legal distinctions between active deception and passive non-disclosure, highlighting how the *de facto* duty to disclose may be perpetuated by dating application evidence.¹⁸

6.2 Rationality, Autonomy, and Responsibility

In this section, I aim to illustrate how the accounts of participants are often driven by an abstract notion of responsibility which relies upon assumptions concerning the nature of individual experiences and rational and irrational decision making in the context of sexual responsabilisation. Several of those writing about criminal law theory have noted how concepts such as autonomy, rationality and – as seen in the previous chapter – consent, are conceptually abstract, removed from the

¹⁸ See Matthew Weait, 'Knowledge, Autonomy and Consent: R v Konzani' [2005] Criminal Law Review 763, 767; Munro (n 16).

contextual settings in which they arise and driven by liberalistic claims of objectivity and universality.¹⁹

As might be expected when discussing issues relating to sexual ethics and the law, responses from participants in this project were not uniform and, in some respects, differed significantly in the distribution of responsibility and culpability. However, a recurring theme across responses was the association between ways of being responsible and a *rational* and *universal* mentality. When discussing scenarios involving the disclosure and non-disclosure of HIV status, many participants made reference to expectations of disclosure which were detached from practical concerns about how disclosure would take place:

- “He should tell anyone he meets with”²⁰
- “He should disclose this before having sexual relations with an individual though”²¹
- “Either they haven’t got it checked recently or at all. Maybe positive and don’t want to disclose that. [...] we all should have [testing] done if we have sex regardless and stops spreading STIs and STDs”²²

Statements such as these are emblematic of a (non-legal) conceptualisation of responsibility in which the role of disclosure is central. As seen in the final quote above, the continued importance of testing stands out in many of these responses and is sometimes justified through reference to broader obligations to community

¹⁹ Vanessa Munro, ‘Constructing Consent: Legislating Freedom and Legitimizing Constraint in the Expression of Sexual Autonomy’ (2008) 41 *Akron Law Review* 923, 929; Tanya Palmer, ‘Distinguishing Sex from Sexual Violation’ in Alan Reed and others (eds), *Consent: Domestic and Comparative Perspectives* (Routledge 2017) 24; and, also, Victoria Brooks, *Fucking Law: The Search for Her Sexual Ethics* (Zero Books 2019) 82–87; Manvir Grewal, ‘Victoria Brooks, *Fucking Law: The Search for Her Sexual Ethics*, Zero Books: London, 2019 [Book Review]’ [2020] *Sexualities*, 2.

²⁰ Participant 401353-401344-41625219

²¹ Participant 401353-401344-43061371

²² Participant 401353-401344-41514592

health; in addition to the emphasis on individual choice and decision making, which I have noted in previous chapters. As Young has noted, discourses of risk management and safer sex – discourses of responsabilisation – have an individualistic, and moralistic, tendency which places much of the ‘burden of containing infection’ onto PLWHIV.²³ Disclosure has, of course, played a significant role in sexual safety and security historically and was central to responses to HIV/AIDS within the gay community, as a relationship of care (in contrast to one of responsibility), once effective testing techniques were developed.²⁴ Nevertheless, what is distinct about responsabilisation when contrasted to this earlier duty of care is the extent to which fault and blame are prescribed primarily or predominantly to people living with HIV,²⁵ and that responsibility is taken to involve their disclosure above all else.²⁶

Weait has suggested that the criminal law is influenced by ‘moral, philosophical and political principles’ - such as rationality, objectivity and universality – which shape the legal construction of responsibility and which ‘deny – or at the very least marginalise – the relevance of’ individual characteristics, experiences, and the context in which issues of responsibility arise.²⁷ In practice, this, it can be suggested, results in an “effective” duty to disclose’ which is closely associated

²³ Diana Young, ‘Individual Rights and the Negotiation of Governmental Power’ (2015) 24 *Social & Legal Studies* 113, 116; see also Nicola Lacey, ‘Space, Time and Function: Intersecting Principles of Responsibility across the Terrain of Criminal Justice’ (2007) 1 *Criminal Law and Philosophy* 233.

²⁴ David M Halperin, ‘The Biopolitics of HIV Prevention Discourse’ in Vernon W Cisney and Nicolae Morar (eds), *Biopower* (Digital Ed, University of Chicago Press 2015) 219.

²⁵ Barry D Adam, ‘Constructing the Neoliberal Sexual Actor: Responsibility and Care of the Self in the Discourse of Barebackers’ (2005) 7 *Culture, Health and Sexuality* 333, 334; Kane Race, ‘Framing Responsibility: HIV, Biomedical Prevention, and the Performativity of the Law’ (2012) 9 *Journal of Bioethical Inquiry* 327, 332; Munro (n 16) 432.

²⁶ Weait, *Intimacy and Responsibility: The Criminalisation of HIV Transmission* (n 10) 184.

²⁷ Weait, *Intimacy and Responsibility: The Criminalisation of HIV Transmission* (n 10) 204.

with the construction of safety and overcoming the uncertainty of risk, as discussed in Chapter 4.²⁸ As seen in Chapters 4 and 5, disclosure was central to many participants' accounts of safety and, actual or perceived, risks – although the stage at which disclosure was necessary varied between responses. Whilst some participants discussed the necessity of disclosure early on in interactions, other participants, even those who felt that disclosure should take place irrespective of risk, suggested that disclosure was only necessary where sexual intercourse was intended:

“The stigma still around it. Some people would get scared about the possibility of getting it even if [the character] still explained about the undetectable viral load. If he wasn't planning on having sex with someone then that's fine. It is a very personal matter but the other person should know as well before hand if you do plan to have sex”.²⁹

Whilst, in Chapter 5, I discussed the perceived necessity of disclosure overcoming both the general claim to privacy that someone living with HIV might have and the more specific challenges resulting from the stigma surrounding HIV, in this chapter, I intend to address how these competing rights narratives arise in relation to HIV criminalisation itself. Statements such as the one above highlight the role of responsibility and the extent to which it is driven by individualistic liberal values of independence and autonomy.³⁰ Arguably, the criminal law is centred on the agency, intention and causality caused by individual agents, with responsibility acting as an organising framework for these concepts.³¹ Responses such as the one above draw on narratives of HIV transmission risk and safety,

²⁸ Samantha Ryan, 'Disclosure and HIV Transmission' (2015) 79 *The Journal of Criminal Law* 395, 399; and, also, Weait, *Intimacy and Responsibility: The Criminalisation of HIV Transmission* (n 10) 191.

²⁹ Participant 401353-401344-41514592

³⁰ Nedelsky (n 11) 5–6.

³¹ Anthony Giddens, 'Risk and Responsibility' (1999) 62 *Modern Law Review* 1, 8–9; Weait, *Intimacy and Responsibility: The Criminalisation of HIV Transmission* (n 10) 198–200.

consent and control, which I have explored in the previous chapters. The specific models of responsible individualism, such as that seen here, demonstrate how responsibility is deployed as a rationale for rights, duties and obligations stemming from these concepts.

Not all accounts of individualistic responsibility placed this responsibility with people living with HIV, however. Throughout the previous chapters I have highlighted the diversity in attitudes towards disclosure and non-disclosure found in the responses including instances where participants felt that disclosure, particularly unprompted disclosure, should not be expected. Several participants, drawing on differing accounts of responsibility to that discussed above, highlighted how those who were HIV-negative had a responsibility to maintain their virological status and manage their sexual health:

“Angry although it would be [the character’s] own fault for not asking and choosing to have unprotected sex without knowing the other party’s status”³²

Discussing the possibility of disclosure and non-disclosure after a sexual encounter,³³ another participant responded that the responsibility would rest with the HIV-negative individual in the scenario:

“[The character living with HIV] might [disclose]. He might not respond at all. After all, at that point, it’s [the HIV-negative character’s] responsibility to manage his own sexual health.”³⁴

In this instance, the extent to which the participant emphasises that it is the responsibility of the HIV-negative character *at this point* is perhaps a further

³² Participant 401353-401344-42414609

³³ Although, this should perhaps be distinguished from other obligations of partner notification, as the vignette used here related to (non-)disclosure immediately after sex had taken place.

³⁴ Participant 401353-401344-43543939

indication of the importance of time and temporality in discussion of risk, safety and sexual decision making. The suggestion that there is a responsibility on HIV-negative individuals to manage their own sexual health after an encounter perhaps reflects the extent to which the ongoing obligations relating to safety interact with the more specific and linear effects of encountered risks.

Although individualistic, the way in which this participant deploys responsibility to highlight the need for individual sexual actors to manage their own sexual health stands in contrast to the other accounts of responsibility seen above. Chalmers, writing following the *Kelly* case in Scotland in 2001,³⁵ points out that discussion over the distribution of responsibility for preventing transmission often presumes an 'either/or' zero sum model whereby responsibility rests either with sexual partners who are HIV-positive or those who are HIV-negative.³⁶ The suggestion that there are, instead, multiple co-existing responsibilities for HIV prevention was echoed by the same participant, who stated:

"I think [the decision to disclose is] completely up to [the character living with HIV], especially given widespread HIV stigma, not to disclose (or be expected to publicly disclose) his HIV status on an app profile. He has taken responsibility for his own health and those of his partners by being on treatment. It's not anyone's business (and his sexual partners have equal responsibility to take care of their own health)."³⁷

Although these accounts stand out for placing a slightly greater emphasis on the situational decision making of the characters in the vignettes, they continue to

³⁵ *HMA v Kelly* [2001] Unreported; see, among others, Victor Tadros, 'Recklessness, Consent and the Transmission of HIV' (2001) 5 *Edinburgh Law Review* 371; Gillian Harris, 'Lover with HIV Guilty of Risking Woman's Life' *The Times* (London, 24 February 2001) 9; Damian Warburton, 'A Critical Review of English Law in Respect of Criminalising Blameworthy Behaviour by HIV+ Individuals' (2004) 68 *The Journal of Criminal Law* 55.

³⁶ James Chalmers, 'The Criminalisation of HIV Transmission' (2002) 28 *Journal of Medical Ethics* 160, 163.

³⁷ Participant 401353-401344-43543939

highlight the deployment of a rational model of responsibility in which individuals maintain a stable standard and expectation of disclosure. It is also notable how *sexual* responsibility is often, in both popular and legal discourse, deployed to undermine claims that societal structures contribute, in whole or in part, to the issues that legal and moral judgement is attached to. Mowlabocus discusses homonormativity in terms of privatisation and individualism where matters such as ‘HIV, mental health or substance misuse are ... a matter of personal responsibility, having little to do with the structural inequalities and pervasive forms of discrimination that queer folk continue to experience’.³⁸ Within the context of PrEP provision within England, and the associated legal cases addressing funding provision for this by the NHS, Mowlabocus finds that HIV prevention, and the sexual health of men who have sex with men more generally, is presented as an issue of individual sexual responsibility ‘which invariably made it vulnerable to the market rhetoric of neoliberalism’ within which gay men can be constructed as *consumers* making market driven decisions.³⁹ In contrast to the sexual health concerns of heterosexuals, which are commonly presented as matters of public health and broader sexual citizenship, Mowlabocus suggests that homonormativity prevents the sexual health concerns of gay men from being presented as public concerns, instead casting them as private matters if homosexuality is to be tolerated within modern society.

Lovelock similarly considers the extent to which media representations of gay men, particularly within the context of PrEP provision and, also, the emerging

³⁸ Sharif Mowlabocus, “‘What a Skewed Sense of Values’: Discussing PrEP in the British Press’ [2019] *Sexualities*, 3.

³⁹ Mowlabocus (n 38) 14–16.

media attention addressing chemsex, position gay men who are outside of the bounds of “safe” homonormative models of gay life’ as inherently risky and irresponsible in matters relating to that risk.⁴⁰ Similar to Mowlabocus, Lovelock argues that the presentations of PrEP and chemsex produce narratives of acceptable and unacceptable sexual expression. Drawing on Joshi⁴¹ and Ashford,⁴² Lovelock suggests that some conceptualisations of non-homonormative sexuality ‘remain charged with associations of danger, threat, irresponsibility, excess, waste, destruction, and death.’⁴³ This includes, as Lovelock points out,⁴⁴ technological innovations such as Grindr and other dating applications, which have the potential to facilitate some homonormative conceptualisations of sexuality but which also carry with them the potential to undermine respectable forms of queerness,⁴⁵ something which was echoed by some participants:

“Sexual health is important but a scary thing for people to discuss most guys on grinder or other hook up apps are straight bi guys who have wife’s and gf they need apps like this to hook up with guys , normally sexual health is never discussed , which should be as these guys could be passing STI to their partners”.⁴⁶

As Ashford has noted, the law has generally been disinterested in enforcing this respectable/unrespectable distinction in relation to bareback sexual identities but has intervened where the transmission of HIV has arisen.⁴⁷ Nevertheless, it plays

⁴⁰ Michael Lovelock, ‘Sex, Death and Austerity: Resurgent Homophobia in the British Tabloid Press’ (2018) 35 *Critical Studies in Media Communication* 225, 226.

⁴¹ Yuvraj Joshi, ‘Respectable Queerness’ (2012) 43 *Columbia Human Rights Law Review* 415.

⁴² Chris Ashford, ‘Bareback Sex, Queer Legal Theory, and Evolving Socio-Legal Contexts’ (2015) 18 *Sexualities* 195.

⁴³ Lovelock (n 40) 236.

⁴⁴ Lovelock (n 40) 235.

⁴⁵ Jody Ahlm, ‘Respectable Promiscuity: Digital Cruising in an Era of Queer Liberalism’ (2017) 20 *Sexualities* 364.

⁴⁶ Participant 401353-401344-41903701

⁴⁷ Ashford (n 42).

an important role in underscoring how legal and non-legal accounts of responsibility often represent disclosure as a necessity because of the “reasonableness”, rationality and respectableness of the disclosure standard. This, furthermore, may impact upon the availability of the consent defence, generally, in light of the restrictions on consent defences encapsulated in *Brown*.⁴⁸ As noted in the previous two chapters, the suggestion that HIV-negative individuals have a “right to know” the HIV status of their *HIV-Positive* sexual partners arose throughout many of the responses. Whilst, as seen in previous excerpts, this responsibility was often taken to involve disclosure within the profile, there was a small proportion of participants who discussed this, on its own, being insufficient. This can be seen in one excerpt, discussing a scenario where HIV status was disclosed within an app profile, where the participant still stated that the character was “not being forthcoming about it”.⁴⁹

Although participants’ accounts of responsibility vary in that the exact nature and extent of obligations stemming from that responsibility differ across the responses, the overall construction of responsibility is based on a number of presumptions which stand out in these accounts. Responsibility, even where it is not directed solely towards people living with HIV, is presented as, primarily, an individual imperative and, furthermore, as necessary for maintaining communal health standards. Elsewhere, I have suggested that this produces “cultures of surveillance” where sexual health information in application profiles is subject to the scrutiny of other users,⁵⁰ something discussed further below. Although not

⁴⁸ Cherkassky (n 6) 257–258.

⁴⁹ Participant 401353-401344-43612383

⁵⁰ Cameron Giles, ‘Digital Disclosure: HIV Status, Mobile Dating Application Design and Legal Responsibility’ [2020] Information and Communications Technology Law.

universal, there was a recurring theme whereby the burdens of responsibility were directed toward, primarily, people living with HIV – often on the basis that their knowledge of their status, HIV, and sexual health generally, facilitated this uneven distribution of responsibility. Consequently, to be responsible was often equated in these responses to disclosure, something which I focus upon in the following section.

6.3 Disclosure Obligations and Responsibility

Obligations of disclosure were pervasive throughout many of the responses, building upon the themes of individualism and responsabilisation noted above. In this section I address how these disclosure obligations supplement and augment the criminal law to produce positive obligations rather than mere prohibitions. Essential to this argument is the extent to which HIV-negativity is taken to be the default position by many who use these applications. Statements such as these emphasise the additional obligations that HIV-positive people are expected to undertake by many application users, take as example:

“A lot of people don’t feel the need to disclose that they are negative because those who are positive are normally expected to do so- so either they didn’t feel the need or are trying to hide the fact they are positive/undetectable”⁵¹

Again, the extent to which non-disclosure is presumed to be an active process of “hiding” one’s status is emphasised in this response. As Ryan points out, the Court of Appeal determined, in *EB*,⁵² it has been suggested, that ‘non-disclosure

⁵¹ Participant 401353-401344-42030243

⁵² *R v EB* [2006] EWCA Crim 2945.

of HIV+ status is not analogous to active deception'.⁵³ Although, whether non-disclosure might be considered an "active" behaviour when someone is asked directly remains a debated legal issue.⁵⁴ As outlined in Chapter 2, the extent to which the distinction between active deception and non-disclosure can be made sufficiently clear is questionable and often draws upon scenarios, hypothetical questions and presumed intentions which may, intentionally or unintentionally, reinforce and privilege particular assumptions, as Sharpe has discussed in the context of gender identity and deception case law.⁵⁵ Similarly, several respondents highlighted that whilst there may not be a general duty of disclosure, responses to direct questions were sufficiently distinct from this to the extent that disclosure should take place:

"I get it. but, obviously, he shouldn't lie if someone directly asks him, and people may assume he's hiding something if it comes out like that in response to a question. the fact that something's been hidden so far would lead someone to wonder "OK so what if he's not really undetectable? I've never met this person, how do I know if I can trust them?" so although he may know full well he's undetectable, it might create less anxiety for him to be totally upfront about everything immediately, if not in the box, then through a conversation. but it's not a situation I've dealt with personally and I don't know what I'd do, so I don't feel right judging [the character's] choices in this regard without knowing them."⁵⁶

In this excerpt, the participant makes a distinction between a response given to a direct question from a prospective sexual partner and more general disclosure which is unprompted, although they also highlight the additional challenges that disclosure only taking place at this later stage might cause. Clough questions

⁵³ Samantha Ryan, "Active Deception" v Non-Disclosure: HIV Transmission, Non-Fatal Offences and Criminal Responsibility' [2019] Criminal Law Review 4, 4.

⁵⁴ Karl Laird, 'Criminal Law Review Rapist or Rogue? Deception, Consent and the Sexual Offences Act 2003' [2014] Criminal Law Review 492; Alex Sharpe, 'Expanding Liability for Sexual Fraud Through the Concept of 'Active Deception: A Flawed Approach' (2016) 80 The Journal of Criminal Law 28; Ryan, "Active Deception" v Non-Disclosure: HIV Transmission, Non-Fatal Offences and Criminal Responsibility' (n 53).

⁵⁵ Sharpe (n 54).

⁵⁶ Participant 401353-401344-41917008

whether the distinction between active deception and non-disclosure is really relevant since, in her analysis, the non-disclosing/deceptive party is acting with the purpose of 'gain[ing] the consent of their sexual partner without knowledge that might affect that decision.'⁵⁷ Her argument is that: '[a] person need not know every detail about a person, or an encounter, but they do need to know that which is important to them in making their decision.'⁵⁸ As with the general debate over materiality discussed in Chapter 5, however, it is unclear how it can be legally and objectively determined what information can be considered "sufficiently important" to a partner's decision making to warrant unprompted disclosure. As what is material to sexual decision making is likely to vary from person to person,⁵⁹ at most the claim might be made that parties need to disclose information which a reasonable person *might* suspect is material to their partner's decision making.

But, whether an objective standard such as that suggested by Clough can be comprehensively and unambiguously defined is highly questionable and subjective standards of "reasonable" disclosure, which often arise in legal, as well as related non-legal, debates, are contentious.⁶⁰ Clough, acknowledging that the range of potentially "material" facts is unquantifiable, suggests that gender identity is, nevertheless, a key factor in sexual decision making, considering how gender interacts with sexual orientation.⁶¹ Similarly, others have suggested that HIV status is among those facts which are material, given the extent to which it

⁵⁷ Amanda Clough, 'Conditional Consent and Purposeful Deception' (2018) 82 *The Journal of Criminal Law* 178, 184.

⁵⁸ Clough (n 57) 184.

⁵⁹ David Archard, *Sexual Consent* (Westview Press, Harper Collins 1998) 46.

⁶⁰ Weait, *Intimacy and Responsibility: The Criminalisation of HIV Transmission* (n 10) 184.

⁶¹ Clough (n 57) 190.

impacts decisions surrounding sexual health.⁶² However, within this debate there is often little consideration of low or no-risk situations, such as those involving an undetectable viral load, and whilst the criminal law in this area would appear not to criminalise non-disclosure in these instances, the ongoing debate around “conditional” consent leaves open the possibility that the criminal law in this area will be expanded upon.

Given the extent to which many men who have sex with men, including some of those who participated in this project, report considering HIV status important to their sexual decision making – irrespective of, or only mildly influenced by, transmission risk – there nevertheless remains a possibility that matters of conditional consent may arise. Fischel suggests that only explicitly conditional consent instigates a moral duty of disclosure, although he also claims that certain questions are sufficiently “unanswerable” to the extent that a duty to disclose does not arise in relation to those issues.⁶³ Whether or not this would be the case in instances of HIV disclosure and non-disclosure again raises issues of legal, as well as moral and ethical, responsibilities.

When discussing the relevancy of disclosure in undetectable cases, responses often emphasise the continued moral obligations to disclose in these instances, even though there was recognition that disclosure was both difficult and less relevant in these instances:

⁶² See, for instance, the commentary of Natalie Reed: Natalie Reed, ‘The “Ethical Imperative” Of Disclosure, or: How To Believe Your Victim Owes You An Opportunity For Abuse’ (*Sincerely, Natalie*, 20 March 2012) <<https://freethoughtblogs.com/nataliereed/2012/03/20/the-ethical-imperative-of-disclosure-or-how-to-believe-your-victim-owes-you-an-opportunity-for-abuse/>> accessed 9 April 2019.

⁶³ Joseph J Fischel, *Screw Consent: A Better Politics of Sexual Justice* (University of California Press 2019) 112–114.

“He [(a non-disclosing character)] thinks it's irrelevant to mention since he can't pass it on. It's dishonest, but understandably a difficult thing for some people to share so openly.”⁶⁴

Again, the distinction between actively offering status disclosure and non-disclosure and deception as a response arose in some participants' accounts:

“He doesn't have to. If there is no risk to other people he does not have to actively offer this information. There is still a stigma attached to being HIV+ so I can understand his reasons for not telling displaying this information publically.”⁶⁵

Several participants did stress, however, that where there was no transmission risk that disclosure was not necessitated and, in fact, non-disclosure and even potentially deception regarding HIV status might be justifiable:

- “He may not want trouble and to panic [his sexual partner], when he knows he cannot pass the virus on”⁶⁶
- “He might potentially pretend he is negative to stop [his sexual partner] worrying since he cannot contract it”⁶⁷
- “I think he would say negative. Maybe people don't understand what undetectable means? Or maybe because Ari knows he can't contract HIV so it's the same as having a negative status”.⁶⁸

Observations such as these which suggested that a somewhat less culpable, and potentially even commendable, motivation might lie behind instances of non-disclosure and deception often focused on the distress and fear that disclosure might produce, taking into consideration the limited knowledge and doubt over transmission risks that some are expected to have.⁶⁹ Equally, however, these

⁶⁴ Participant 401353-401344-41531870

⁶⁵ Participant 401353-401344-41613134

⁶⁶ Participant 401353-401344-42640038

⁶⁷ Participant 401353-401344-42030243

⁶⁸ Participant 401353-401344-40164814

⁶⁹ Scott Burris and Matthew Weait, 'Criminalisation and the Moral Responsibility for Sexual Transmission of HIV', *Third Meeting of the Technical Advisory Group on the Global Commission on HIV and the Law* (2013) 8–14.

variations in awareness were often employed to place greater obligations upon those living with HIV to educate, inform or otherwise allay the fears of partners who are HIV-negative:

- “[The HIV-negative character in the scenario would p]robably panic and worry until he researched undetectable load and has a test himself. I’d understand anger as a sexual partner has a right to know”⁷⁰
- “I think [the HIV+ character] may say and emphasise that he cannot pass it on. Potentially reassuring through evidence/articles online.”⁷¹

As these accounts exemplify, the additional knowledge and experience that people living with HIV are presumed to have factor into the additional forms of responsibility which some participants felt they had. This is in addition to the responsibilities specifically relating to treatment, and in particular adherence, which were often flagged by participants. As noted in Chapter 4, the recognition of the effectiveness of TasP has had a notable impact on the construction of responsibility. Guta et al have suggested that the “success” or “failure” of people living with HIV in becoming, or not becoming, virally suppressed is, in part, paradoxical considering the extent to which an undetectable viral load might be both liberating and restrictive to those employing the identifier of “undetectable” in everyday life.⁷²

Various aspects of participants’ responses in this area are notable, including the extent to which disclosure of an undetectable status is subject to additional

⁷⁰ Participant 401353-401344-40158345

⁷¹ Participant 401353-401344-41991164

⁷² Adrian Guta, Stuart J Murray and Marilou Gagnon, ‘HIV, Viral Suppression and New Technologies of Surveillance and Control’ (2016) 22 *Body & Society* 82, 94–95.

scrutiny, surveillance and doubt in some instances beyond that directed toward HIV-negative or unknown statuses:

“Undetectable HIV is when an individual has undergone treatment for HIV and the levels in their body are far reduced, making the virus much harder to pass on. Depending on when it was set, the test history would suggest that this person is not undetectable as it takes 3-6 months for treatment to reduce the HIV level.”⁷³

Although many participants expressed a sense of reassurance when seeing an undetectable viral load, questions of adherence to treatment regimens, regularity of testing and overall “responsible” management of health often persisted:

“This person has contracted HIV but I assume is on anti-retrovirals which have reduced his viral load to an undetectable level - meaning his chances of passing on HIV to his partners are slim to none. In order to have achieved this I would imagine his compliance with the medication is high - so I think he takes both his, and his potential sexual partners' health seriously. The last test was on 1st September 2018 - this means that at that time his viral load was undetectable, however there is the potential for this to have changed so without an up to date test it's unclear what his risks of passing HIV on are.”⁷⁴

Such concerns were often focused upon the apparent impermanency of an undetectable status when contrasted with the permanency of HIV:

“[I'm a]ware [of TasP,] yes but undetectable is not a permanent status unlike hiv+ since unless they keep up the meds they can become detectable in between screenings”.⁷⁵

What is often not considered in this context, however, is the impermanency of HIV-negative statuses and the precarious nature of HIV-negative test results.⁷⁶

Although participants often conceived of undetectable as an impermanent status,

⁷³ Participant 401353-401344-42030243

⁷⁴ Participant 401353-401344-43683239

⁷⁵ Participant 401353-401344-40167755

⁷⁶ Kane Race, 'Click Here for HIV Status: Shifting Templates of Sexual Negotiation' (2010) 3 *Emotion, Space and Society* 7, 8.

with a degree of uncertainty about it, observations such as the ones below were rarely mirrored by similar observations about the state of HIV-negativity:

- “If actually undetectable (i.e. HIV positive, but medicated so as to massively reduce transmission of HIV), it does not phase me at all. However, if I were to see that test date now [3 ½ months after the date listed], I would be concerned that someone who is diagnosed as HIV positive had not been for a more recent check up (it subconsciously implies they may be inept at other things like taking their medication). It is also unclear what ‘Test History’ actually means, as it is not specifically “date on which you were last tested for HIV”⁷⁷
- “As far as my understanding goes this is rigorously controlled by strict medication and although undetectable the person is still positive and precautions should still be advised. The fact that the last tested section is within 4 months of the current date I would not be overly alarmed, this could be due to a host of reasons, chief that he has not had sexual intercourse during that time and has not had cause to be retested. I would become concerned if the date were to be over 6 months and very weary if it were over 12”.⁷⁸

Indeed, as noted previously, HIV-negative statuses were often seen to capture a broader sexual responsibility which participants perceived, and often led to particular expectations surrounding disclosure:

“I know it only says 'HIV Status: Negative' however whenever I see this on an app, I think to myself "This guy must be responsible as he gets tested regularly, and of course he wouldn't sleep with me knowing he has something without telling me" - at least I hope.”⁷⁹

This particular participant’s account of disclosure and what disclosure and non-disclosure indicate *vis-a-vis* sexual responsibility highlights how the multiple, sometimes inconsistent, aspects of sexual responsibility are often reduced down to singular indicators. As Mazanderani has suggested, the ethics of HIV disclosure and non-disclosure are fraught with complexities of this kind, which

⁷⁷ Participant 401353-401344-42164625

⁷⁸ Participant 401353-401344-42316129

⁷⁹ Participant 401353-401344-40168692

are perhaps compounded by the additional challenges of online interaction.⁸⁰ The Court of Appeal, in *EB*, highlighted the extent to which these issues remained a matter of ongoing public debate above and beyond the specific legal debates that existed then and remain ongoing since that case was heard.⁸¹ Nevertheless, the extent to which responsibility is equated, in the eyes of many, to disclosure, is consequential, particularly as the socio-medical discourse on sexual health continues to evolve.

Several of those writing on the issue of HIV criminalisation have suggested that there is, in effect, a duty of disclosure notwithstanding the apparent alternatives to disclosure which have been noted in *Konzani*. Weait and Ryan have both pointed out that the approach taken by the courts to date has been disinterested in voluntary nature of risk taking by a sexual partner who is aware of the risks that could potentially accompany condomless sex, instead focusing on the perceived culpability of the non-disclosing party.⁸² Worth, Patton and Goldstein have advocated for reformulation of sexual responsibility for preventing HIV infections, based on the premise that 'responsibility for preventing HIV infection does not lie with the individual, or even in the interaction between two individuals, but rather should be a collective response on the part of whole communities and populations.'⁸³ However, to date these arguments have not been reflected in the criminal law in England and Wales, arguably because the case-by-case nature of

⁸⁰ Fadhila Mazanderani, 'An Ethics of Intimacy: Online Dating, Viral-Sociality and Living with HIV' (2012) 7 *BioSocieties* 393, 406–407.

⁸¹ *R v EB* (n 52) [20].

⁸² Matthew Weait, 'Unsafe Law: Health, Rights and the Legal Response to HIV' (2013) 9 *International Journal of Law in Context* 535, 541; Ryan, 'Disclosure and HIV Transmission' (n 28) 399.

⁸³ Worth, Patton and Goldstein (n 9) 11.

the criminal law is ineffective at responding to the broader public health demands of HIV prevention.

Instead, as highlighted in Chapter 2 and above, the courts have developed what is in effect an obligation to disclose HIV-positive status to be assured of the avoidance of criminal sanctions.⁸⁴ Although this duty can be mitigated by condom use, viral suppression, and PrEP based risk reduction,⁸⁵ disclosure remains the only certain way for people living with HIV to avoid criminal sanctions. This is not as extensive as the approach taken in other jurisdictions, where disclosure is necessary in both legal framing of the issue and these practical terms.⁸⁶ But, nevertheless, this effectively imposes a particular construction of what it means to be responsible onto those engaging with issues of sexual health, HIV prevention and communication in a sexualised setting.⁸⁷

Following *Konzani*, the limited range of circumstances in which someone living with HIV may claim an honest and reasonable belief in the informed consent of their partner have arguably been misinterpreted as facilitating a much broader right to non-disclosure.⁸⁸ Cherkassky, for instance, has suggested that it is “currently the victim’s responsibility and can come in many guises, and the

⁸⁴ Weait, ‘Knowledge, Autonomy and Consent: R v Konzani’ (n 18) 767–768; Ryan, ‘Disclosure and HIV Transmission’ (n 28) 399–400.

⁸⁵ Although, the effectiveness of this mitigation remains underexplored in case law and is highly dependent upon prosecutorial discretion. See David Hughes, ‘Condom Use, Viral Load and the Type of Sexual Activity as Defences to the Sexual Transmission of HIV’ (2013) 77 *The Journal of Criminal Law* 136; David Hughes, ‘The Criminal Transmission of HIV: Issues with Condom Use and Viral Load’ (2014) 54 *Medicine, Science and the Law* 187.

⁸⁶ See, for instance, discussion of the Canadian legal framework in Barry D Adam and others, ‘Impacts of Criminalization on the Everyday Lives of People Living with HIV in Canada’ (2014) 11 *Sexuality Research and Social Policy* 39, 40.

⁸⁷ Race (n 25) 331.

⁸⁸ See *R v Konzani (Feston)* [2005] EWCA Crim 706 [42]-[44]; and, Weait, ‘Knowledge, Autonomy and Consent: R v Konzani’ (n 18) 770.

defendant must simply believe that the victim has done her research, leaving him to bear no responsibility as an 'informant' to divulge his status."⁸⁹ This claim seems based on Cherkassky's assumption that 'in all instances where a defendant hides his HIV status, he is being deceptive' and that it is not, in any event, possible to hold a *reasonable* belief in consent if disclosure has not taken place.⁹⁰ If this assumption is accepted, then it may possibly be argued that the law consequently enables defendants to avoid responsibility through the honest belief in consent defence found in *Konzani*.⁹¹

However, given the extent to which reasonable beliefs are the indirect product of conceptualisation of sexual responsibility, it is argued that this does not reflect the reality of HIV criminalisation prosecution. Given the extent to which, as has been demonstrated here, (sexual) responsibility in these instances is conceived of as interconnected with disclosure, the disclosure standard is liable to extend into the application of the criminal law through the reduction or elimination of situations where there is held to be a reasonable belief in the informed consent of the HIV-negative partner. Writing in an Australian context, Houlihan points out that:

Prosecutorial success seems dependant on the socio-sexual pathology of the offender and the socio-sexual normalcy and vulnerability of the 'victim?'. Punishment is calculated on the Otherness of the offender to their victim, but also on stereotypes of HIV vectors. The level of harm appears to be dependant on the (moral) innocence of the victim, rather than on scientific calculations of HIV risk. The case law is extremely inconsistent and confusing.⁹²

⁸⁹ Cherkassky (n 6) 244.

⁹⁰ Cherkassky (n 6) 252.

⁹¹ *R. v Konzani (Feston)* (n 88).

⁹² Annette Houlihan, 'Risky (Legal) Business: HIV and Criminal Culpability in Victoria' (2011) 4 *International Journal of Liability and Scientific Enquiry* 305, 320.

So too, in the English context, does the criminal law employ particular constructions of social and sexual responsibility which, in effect, create a disclosure standard which applies to, if not in whole, then at least the overwhelming majority of cases of sexual activity, if the HIV+ partner is to be certain of avoiding the imposition of criminal sanctions or, more worryingly, intense investigation and scrutiny by police.⁹³ Mykhalovskiy has pointed out that false allegations of non-disclosure can effectively be used by the partners of people living with HIV as a form of coercive control where transmission is not required for an offence to be committed.⁹⁴ Given the additional concerns that might be raised about instances of intentional transmission, following *Rowe*,⁹⁵ such issues deserve further consideration from a socio-legal perspective, in order to better understand the impact that the law has on the lived experiences of people living with HIV. This piece does not make any direct claims concerning the diverse range of experiences of the law felt by PLWHIV specifically, although these issues have been explored by others.⁹⁶ However, the influence of responsibility on these issues stands out in the accounts of participants here, both those of who did not discuss the law directly and those, who I now turn to, who invoked understandings of the law directly in their responses.

⁹³ Emily Jay Nicholls and Marsha Rosengarten (eds), 'Witness Seminar: The Criminalisation of HIV Transmission in the UK', *Disentangling European HIV/AIDS Policies: Activism, Citizenship and Health (EUROPACH)* (2019) 35–36.

⁹⁴ Eric Mykhalovskiy, 'The Problem of "Significant Risk": Exploring the Public Health Impact of Criminalizing HIV Non-Disclosure' (2011) 73 *Social Science and Medicine* 668, 673.

⁹⁵ *R v Rowe* [2018] EWCA Crim 2688.

⁹⁶ Catherine Dodds, Adam Bourne and Matthew Weait, 'Responses to Criminal Prosecutions for HIV Transmission among Gay Men with HIV in England and Wales' (2009) 17 *Reproductive Health Matters* 135; Matthew D Phillips and Gabriel Schembri, 'Narratives of HIV: Measuring Understanding of HIV and the Law in HIV-Positive Patients' (2016) 42 *Journal of Family Planning and Reproductive Health Care* 30.

6.4 Legal Responsibility and Understanding of the Law

As noted above, the criminal law relating to HIV transmission is linked with moral and/or social responsibilities of the kind discussed in the previous section.⁹⁷ Consequently, obligations surrounding the disclosure of HIV status, where it is known, are often legitimised by reference to the law, something which can be seen in the minority of responses which made direct reference to the law governing HIV transmission in England and Wales in this project. Furthermore, more general discussion of responsibility and risk reduction often drew upon similar concepts whilst not making direct reference to criminal law itself, serving to underscore the extent to which these obligations are, at least partially, internalised by some who use mobile dating applications.

In this section, I discuss participants' accounts of the law and seek to highlight the extent to which specifically legal knowledge is limited, sometimes contradictory and a source of uncertainty to some, points which were all recognised by participants to some extent. Despite this uncertainty, participants' recourse to the law often focuses on the perceived illegality of non-disclosure and utilised moral judgments on non-disclosure and as justification for the law's approach. One participant responding to a vignette involving non-disclosure explained that:

“[The Character] has a legal obligation to disclose his status if he knows what it is I understand his reasons not wanting to publish it due to the stigma surrounding HIV but not disclosing it would be worse for the stigma I know undetectable means it cannot be spread however he still has the legal obligation to disclose it.”⁹⁸

⁹⁷ Farmer (n 3).

⁹⁸ Participant 401353-401344-42091302.

The participant's emphasis on the legal obligation stemming from the knowledge that the HIV+ character has regarding his status highlights the extent to which legal responsibilities and perceived (but potentially false) legal responsibilities are closely associated with other forms of responsibility, including testing, treatment and maintaining an awareness of health. One often debated concern, particularly in the period of time around *Dica*, was the possibility that criminalisation would deter testing on the basis that knowing one's HIV status would open up the possibility of prosecution for non-disclosure.⁹⁹ However, the link between criminalisation and decreases in testing is, itself, questionable.¹⁰⁰ Furthermore, whether prosecution could take place in instances where, notwithstanding a lack of a medical diagnosis, a defendant had (potentially strong) reasons to suspect that they were HIV+ remains underexplored in the English context.¹⁰¹

Whilst stigma was identified by many participants as a reason for non-disclosure, this was primarily discussed in the context of social stigma from other application users directed towards people living with HIV. The possibility that the law's response to HIV transmission was itself a source of stigma was never suggested by participants, although this participant provides some evidence that this might be the case. In contrast to the many participants who conceived of non-disclosure as a result of stigma, this participant sees it explicitly as producing the stigma surrounding HIV. The suggestion by the participant that the visibility associated

⁹⁹ See, for instance, Sheila M Bird and Andrew J Leigh Brown, 'Criminalisation of HIV Transmission: Implications for Public Health in Scotland' (2001) 323 *British Medical Journal* 1174; Ruth Lowbury and George R Kinghorn, 'HIV Transmission as a Crime' (2006) 14 *Student BMJ* 446; Eric Mykhalovskiy, 'The Public Health Implications of HIV Criminalization: Past, Current, and Future Research Directions' (2015) 25 *Critical Public Health* 373, 375.

¹⁰⁰ Chalmers (n 36).

¹⁰¹ Warburton (n 35) 59; Samantha Ryan, 'Risk-Taking, Recklessness and HIV Transmission: Accommodating the Reality of Sexual Transmission of HIV within a Justifiable Approach to Criminal Liability' (2007) 28 *Liverpool Law Review* 215, 219.

with disclosing HIV within a profile makes disclosure more difficult reflects the broader privacy concerns highlighted by other participants. The participants' focus on the causation between stigma and non-disclosure (or, in this instance, between non-disclosure and stigma) further highlights the extent to which HIV related anxieties are associated with HIV being a concealable characteristic.

Fewer than 1 in 10 participants made direct reference to the legal framework of HIV criminalisation; however, notably all but one of these participants outlined a belief that non-disclosure was itself criminalised, rather than impacting culpability where transmission occurs, or otherwise reported an uncertainty regarding the exact nature of the obligations under the law. Similarly, these responses often incorporated an association between criminalisation and the moral or ethical responsibility perceived to be on people living with HIV to disclose. One participant emphasised that '[the decision not to disclose] is unlawful and very bad as you can be criminalised for it'.¹⁰²

As with the participant initially quoted above, uncertainty surrounding the law was often further complicated by the impact of treatment as prevention, with one participant reporting an uncertainty surrounding the legal obligation to disclose whilst also being aware that having an undetectable viral load meant that the character in a scenario "posed the same level of threat (zero)" as someone who was HIV negative.¹⁰³ Notably, the decision not to disclose HIV status when viral load was undetectable was seen by this participant as an ethical course of action, as the participant felt that 'morally' there could not be a distinction between being

¹⁰² Participant 401353-401344-42364064.

¹⁰³ Participant 401353-401344-41629677

HIV- and having an UVL. In contrast to the association between morality and the law suggested by other participants, where the two both support the imposition of an obligation to disclose, this participant's response makes it clear that the law itself can create a belief that disclosure will take place.

Whilst the majority of participants who discussed the legal framework covering HIV criminalisation had a general understanding of the existence of a legal obligation to disclose, only one participant identified that this obligation arises specifically where transmission takes place as a result of unprotected sex. This participant also identified that the particular offence a defendant would be charged with would be GBH, although there is no particular reference to the distinctions between s. 18 and s. 20 variants of the offence. Discussing the same scenario involving a profile which did not use the HIV disclosure feature within the profile:

“[The character would] disclose his status. It's GBH if the other person contracts [HIV] from unprotected sex and they haven't been informed.”¹⁰⁴

Whilst identifying that disclosure or non-disclosure is only relevant in instances where transmission occurs, it is notable that this participant, who reported an awareness that an undetectable viral load prevents transmission of HIV, held a belief that disclosure would take place in a scenario where the character in question was aware that they had an undetectable viral load. Taking into consideration the doubt expressed by other participants about the absolute efficacy of TasP as a prevention technique, this is perhaps less surprising. Nevertheless, there is a seeming contradiction between the belief that disclosure

¹⁰⁴ Participant 401353-401344-43067383.

is warranted because of the criminalisation of transmission stemming from unprotected sex and the belief that disclosure is warranted in this case where treatment means that any sex is unprotected.

Misconceptions about the law and the implications that this might have on disclosure expectations were discussed by Dodds, Bourne and Weait, who found that a majority of their participants held some misconceptions about the distribution of legal responsibility in transmission cases.¹⁰⁵ Dodds et al also noted the possibility that these misconceptions, alongside inaccurate assessment of the risk of transmission, might impede public health measures designed to prevent transmission.¹⁰⁶ Similarly, the attitudes expressed by participants here suggest that, for many not living with HIV, the assumption that those living with HIV are under an obligation to disclose guides their sexual health practices. Discussing a profile which left the HIV status field blank, one participant explicitly explained that:

“I'd assume [the character in the profile] is free from disease. I leave mine blank too. There is s legal obligation to say if you are infected.”¹⁰⁷

This response highlights how, for some, the disclosure focus within the legal framework is positioning being HIV- as the norm, a norm which can then be assumed where disclosure does not take place. Although other participants reflected on the need for inquiry where no disclosure took place, a point returned to below, misconceptions about where disclosure is necessary and where preventative measures are sufficient are likely to compound the stigma

¹⁰⁵ Dodds, Bourne and Weait (n 96); see also Phillips and Schembri (n 96).

¹⁰⁶ Dodds, Bourne and Weait (n 96) 142–143.

¹⁰⁷ Participant 401353-401344-41625219.

surrounding HIV, further complicating the disclosure practices of people living with HIV.¹⁰⁸

The misconception that there it is always a legal necessity to disclose to a sexual partner, irrespective of the transmission risk present in the situation, might lead to some, such as the participant above, believing that they are avoiding risk when, in fact, they are not. As seen above, the moral arguments employed in relation to HIV are curtailed by a general recognition that disclosure is fraught with the risk of harassment and ostracisation caused by the stigma still surrounding HIV status. Yet, as with the example of the participant here, the law appears less susceptible to the critical examination which leads other participants to recognise that their own personal attitudes surrounding the morality of non-disclosure may be flawed in practice. Whilst some making reference to the legal obligation to disclose noted the difficulties that PLWHIV face when they disclose, participants were generally unpersuaded and felt that the law created an appropriate expectation of disclosure between sexual partners in all circumstances.

Whereas in earlier work the risk of criminalisation led, in some instances, to HIV+ men being increasingly aware that online profiles might be used in legal proceedings, leading to additional care taken to explicitly discuss HIV status within them,¹⁰⁹ here the attitudes of HIV- men have suggested that the law is shaping their expectations surrounding the distribution of responsibility. That several participants considered the risk in a given situation to be irrelevant to the

¹⁰⁸ Adam and others (n 86); Barry D Adam and others, 'HIV Disclosure as Practice and Public Policy' (2015) 25 *Critical Public Health* 386, 319.

¹⁰⁹ Dodds, Bourne and Weait (n 96) 141.

legal obligation to disclose, it might be suggested, is driven not only by the desire for serosorting to be an effective sexual health strategy but also by application design within which silence does not stand out as a neutral statement. As Kane Race argues in relation to HIV disclosure within online websites, the serosorting strategies of HIV- men might be seen not only as a product of ‘attitudinal prejudice on the part of HIV- men’ but also as a result of the design of HIV disclosure features ‘formatting sexual negotiation’ in a potentially stigmatising manner.¹¹⁰

Reference to the law governing HIV transmission is sparse on dating applications themselves, although there is some reference to it on the sites of application developers alongside links to additional sources of information. The limited reference to the law in the responses of participants, and the confusion over the exact nature of culpability by those who did reference it, suggests that the law continues to play a limited role in governing the personal sexual health strategies of the participants in this project. What the analysis here does suggest, however, is that where the law is referred to, it impacts perceived responsibility by reinforcing the moral belief in the obligation to disclose. That this belief is still prevalent despite the general awareness among participants about the efficacy of treatment as prevention, notwithstanding the minority of participants who were unaware of, or doubted, TasP’s preventative potential, may demonstrate changing appetites towards risk. However, it may also reflect a renewed desire by HIV- men for individual responsibility towards HIV prevention, which

¹¹⁰ Race (n 76) 13.

challenges the reliance and trust that medicalised prevention strategies,¹¹¹ generally, are based upon.¹¹²

Furthermore, given the relatively high-profile nature of recent case law addressing other instances of criminalisation incorporating perceived deception or non-disclosure of information,¹¹³ the possibility of continued confusion over the nature of the obligation to disclose remains non-remote. Whilst TasP would mean that there would be no case to answer should an instance of non-disclosure be discovered and reported, the possibility that the police might still pursue such a complaint is not itself an impossibility.¹¹⁴ Although these cases should not result in wrongful convictions, subject to the approach in *Dica* and *Konzani* being upheld, the possibility that these cases may still be brought is concerning given the already fraught relationship between the law and efforts in HIV prevention.¹¹⁵

The limited awareness of the criminal law exemplified by participants in this project demonstrates some of the limitations that arise when the criminal law intervenes in a setting with complex social, interpersonal and personal forms of responsibility and morality. The responses here suggest that even where men who have sex with men have an awareness that the criminal law in this area exists, their understanding is likely to be incomplete and potentially contradictory. As others have suggested, misinterpretation of the criminal law may have an impact on the personal safety, disclosure and non-disclosure strategies of men

¹¹¹ Although the discussion here focuses on HIV- men's attitudes towards TasP; these arguments might have some relevance to discussion of PrEP as a "medicalised" prevention strategy also.

¹¹² Bridget Haire and John Kaldor, 'HIV Transmission Law in the Age of Treatment-as-Prevention' (2015) 41 *Journal of Medical Ethics* 982.

¹¹³ For example, *R v McNally* [2013] EWCA Crim 1051

¹¹⁴ Nicholls and Rosengarten (n 93), in particular, Azad at 31.

¹¹⁵ See, generally, Weait, 'Unsafe Law: Health, Rights and the Legal Response to HIV' (n 82).

who have sex with men, with the potential divergence of expectations possibly contributing to unaware risk taking by some.¹¹⁶

These challenges are also reflected in the different attitudes towards non-disclosure and deception which participants discussed, most notably in how participants discussed interpreting the actions of those who did and did not disclose as either intentionally deceptive, reckless, as an omission or otherwise. This is consequential, not only as to how the law is framed but also in how the *duty to know* the law and the *duty to disclose* known HIV status bring legitimacy to the claims that non-disclosure is an active process, which the final section below discusses.

6.5 Deception, Responsibility and Passivity

This chapter so far has aimed to highlight the conceptual complexity of responsibility in the context of HIV transmission, as well as the extent to which the criminal law draws upon particular models of responsibility in responding to HIV transmission and how this is often a source of misunderstanding or confusion for those engaging with these issues on a practical basis. In this section, I explore how responsibility can contribute to perceived obligations of disclosure which shape and distinguish non-disclosure of HIV status and supposedly “active” deception.

As outlined in Chapter 2, the consent defence open to defendants in the absence of direct disclosure is based on the premise that there may still be a *reasonable*

¹¹⁶ Dodds, Bourne and Weait (n 96); Phillips and Schembri (n 96).

belief that the complainant was consenting, although this is prevented where there is held to be concealment of HIV status.¹¹⁷ However, the limitations and challenges of introducing a reasonableness standard in this context have been well noted, including by some who suggest that this allows culpable defendants to avoid liability.¹¹⁸ Arguably, this relies upon a construction of non-disclosure as synonymous with, or alternatively sufficiently similar to, overt deception on the part of the defendant,¹¹⁹ as well as on a desire not to obligate a potential complainant to proactively inquire in order for the law to come into effect.¹²⁰

As well as offering a general critique of these claims, this section aims to explore the attitudes towards online deception expressed by participants. It begins by providing an outline of the various ways in which participants discussed deception, before then considering how legal distinctions between active deception and passive non-disclosure might be obfuscated by the disclosure obligations discussed above. It consequently argues that non-disclosure is vulnerable to evidence taken from mobile dating applications which might result in defendants being found liable for non-culpable behaviour because of a “duty to know” the apparent importance of HIV disclosure to others.¹²¹

Expectations, experiences and attitudes towards supposedly deceptive practices were common throughout the responses, with many responses highlighting how

¹¹⁷ *R. v Konzani (Feston)* (n 88) [42], [44]-[45]. See also, Section 2.2.2, above.

¹¹⁸ See, for instance, David Hughes, ‘Did the Individual Consent to the Risk of Harm? A Comparative Jurisdictional Analysis of Consent in Cases of Sexual Transmission/Exposure to HIV’ (2018) 82 *The Journal of Criminal Law* 76, 84, among others.

¹¹⁹ Alan Reed and Emma Smith, ‘Caveat Amator: Transmission of HIV and the Parameters of Consent and Bad Character Evidence’ in Alan Reed and others (eds), *Consent: Domestic and Comparative Perspectives* (Routledge 2017) 217.

¹²⁰ JR Spencer, ‘Liability for Reckless Infection Pt 1’ (2004) 154 *New Law J* 384.

¹²¹ Valverde (n 5) 169–172.

deception is conceptually complex and multifaceted in the context of mobile dating application use. This section focuses upon three sub-themes which stood out among the data. Firstly, how deception was discussed as something to be expected, and almost mundane, when using mobile dating applications. Secondly, the manner in which deception was discussed as something which, whilst not condoned, was understandable given some of the attitudes and prejudices seen on applications of this kind. Third, and interrelated with the previous two points, is the suggestion within the data that many participants see deception measured in degrees, rather than as a binary of deceptive and non-deceptive practices.

The first of these, the commonality of deceptive practices of various kinds, was noted by several participants, including one who stated:

“On gay apps there are many fake accounts, you can't trust anyone really, as soon as I can I make people prove who they are and often they are not willing to do that.”¹²²

The importance given to the concept of trust, which I identified in Chapter 5, is demonstrated here as the participant highlights a general attitude of mistrust on these applications which produce personal safety strategies such as the one the participant discusses using. At first, this may appear to be a relatively limited phenomenon, however other accounts highlighting similar concerns, particularly surrounding “catfishing” – the act of pretending to be someone else¹²³ – demonstrate that such concerns are, at least somewhat, widespread:

“[The lack of a picture in the profile may be b]ecause he could be a catfish or do not want to give many information as what he is looking for is not

¹²² Participant 401353-401344-42096316

¹²³ Chris Haywood, *Men, Masculinity and Contemporary Dating* (Palgrave Macmillan 2018) 78.

well seen in nowadays life, and people around could be very traditional. He does not want to be recognised.”¹²⁴

and, similarly;

“This profile is likely to be fake due to their weight being significantly greater than the image suggests and their body type suggests. Also the date discrepancies in age make it seem less realistic- it might be spam, or a catfish. ... This person is likely using the app to collect information on people that are likely to believe it is real, and to collect personal images.”¹²⁵

As noted in Chapter 3, the weight discrepancy the participant alludes to was an unintentional error within one of the stimuli images which meant that the weight listed was significantly higher than might be expected. However, commentary on the error proved insightful, particularly in relation to the anxieties that participants had about “fake” profiles on dating applications. As this participant highlights, concerns around catfishing often highlight how the collection of personal data, particular sexually explicit images, is a pressing concern for many app users. Others have noted similar anxieties and the impact that this can have on the mental health of application users,¹²⁶ as well as highlighting how collected images might be used for coercive means, potentially as a form of revenge pornography.¹²⁷

As Noto La Diega has observed,¹²⁸ although those who use dating applications often express concerns surrounding privacy, the sharing of personal information both generally, and in specific conversation with other users, is common. Others

¹²⁴ Participant 401353-401344-42505942

¹²⁵ Participant 401353-401344-42030243

¹²⁶ Carolyn Lauckner and others, “Catfishing,” Cyberbullying, and Coercion: An Exploration of the Risks Associated with Dating App Use among Rural Sexual Minority Males’ (2019) 23 *Journal of Gay and Lesbian Mental Health* 289.

¹²⁷ Ari Ezra Waldman, ‘Law, Privacy, and Online Dating: Revenge Porn in Gay Online Communities’ (2019) 44 *Law and Social Inquiry* 987.

¹²⁸ Guido Noto La Diega, ‘Grinding Privacy in the Internet of Bodies’ in Ronald Leenes and others (eds), *Data Protection and Privacy* (Hart Publishing 2019).

have pointed out that photo and information sharing is often a prerequisite to active engagement with others on these applications,¹²⁹ despite many also highlighting the low success rate that many application users report in achieving the aims motivating their use.¹³⁰ Many participants reported that some deceptive actions were common, particularly in relation to certain characteristics such as age, which could be amended to appeal to different groups of users:

- “Whilst apps update age annually, this doesn't impact the body text. Most guys lie about their age, adding years on when younger or taking a lot off when older”¹³¹
- “It is possible that they have set their age incorrectly by accident, but this is unlikely and it may be possible that they have lied about their age to fall into other people's preferences (as you can search people by age), but then puts their real age in the bio so as to appear honest.”¹³²

Whilst the ethicality of both of these individual examples may be questioned, the recognition by many participants that deceptions exist raises the argument that certain deceptions on these apps are expected, to the extent that from a consequentialist perspective it might be suggested that low level deceptions are already factored into applications users' evaluation of truth, trust and responsibility. Several other participants emphasised that what might be considered deceptive acts might be ethically acceptable in light of the prevalence of issues of racism, ageism and other discriminatory behaviours.¹³³ For example, one participant stated:

“Opting out of providing ethnicity information may be a sad indictment of the racism faced by many people of colour on gay dating apps - I.e. the profile creator is a person of colour and thinks that admitting it may harm their chances. Whilst omitting HIV related information could be a

¹²⁹ Waldman (n 127) 996.

¹³⁰ Sam Miles, 'Sex in the Digital City: Location-Based Dating Apps and Queer Urban Life' [2017] *Gender, Place & Culture* 1605.

¹³¹ Participant 401353-401344-40473816

¹³² Participant 401353-401344-41493556

¹³³ See, for instance, Noto La Diega (n 128).

suggestion of lack of desire to public admit HIV positivity, it seems more likely that this was negligence, either in creating the profile, or in knowing his status.”¹³⁴

As this participant explains, HIV status can also be present in this conceptualisation of deception and non-disclosure, although other issues relating to omitting status information generally remain. Other participants, however, also suggested that prevailing attitudes toward people living with HIV did, in part, explain tendencies of non-disclosure:

“It's absolutely fine, he's not lying and there's a lot of stigma about HIV+ guys so he might have better luck hooking up if guys connect with him first and the discussion about status comes up later.”¹³⁵

This indicates, and the accounts below emphasise, that non-disclosure of HIV is often understood to be innocently motivated, unless and until a later opportunity to explain in a more supportive setting arose, or until disclosure was perceived to be necessary:

- “If [non-disclosure was a result of] stigma, and to give [the character in the scenario] a chance to explain during chat - fair enough. - If so that he can satisfy a fetish of having unprotected sex with men whilst he has HIV - bad. - If privacy - fine. Basically, it all depends on whether he would volunteer that he is HIV positive before having sex, or would answer truthfully if asked.”¹³⁶
- “I'd imagine that [the character's] decision [not to disclose] to do so is based on fear of the stigma attached to a HIV diagnoses. I'd say that his decision not to include it is his business, but if he was meeting someone, I'd feel he has a responsibility to tell them especially if asked directly about it. It could be seen as deceptive that he didn't tell them about it.”¹³⁷
- “I can understand not mentioning on profile but when asked he should respond honestly.”¹³⁸

¹³⁴ Participant 401353-401344-42164265

¹³⁵ Participant 401353-401344-42628211

¹³⁶ Participant 401353-401344-40159732

¹³⁷ Participant 401353-401344-42164399

¹³⁸ Participant 401353-401344-42322573

In these accounts, the extent to which participants appear to suggest that there are *degrees of deception and (dis)honesty* is notable, particularly given the extent to which there is not a recognition of this reality in the current legal framework. In line with the CoA's judgement in *Konzani*, non-disclosure of a positive HIV-status is "incongruous with honesty", arguably irrespective of the motivations behind non-disclosure.¹³⁹ Others have recognised that this effectively neuters any suggestion that non-disclosure may be warranted because, to take one example, disclosure would place the defendant at immediate and significant risk of physical harm themselves.¹⁴⁰ Critically, these concerns may change over time, being a significant concern in specific contexts, locations, or when talking or interacting with specific users, factors which the law may fail to address when evaluating "straightforward" deceptions.

Further discussion of potential degrees of deception and dishonesty reflected on the nature of omissions and partial truths. In several examples, participants framed discussion of the absence of risk as less than wholly honest where scenarios involved undetectable viral loads:

"I would expect [the character] to provide an intermediate response (i.e. not a clear negative or positive), possibly something along the lines of 'I don't have any STIs you can catch from me'".¹⁴¹

The extent to which responses such as these, including, for example stating that status was unknown, were considered "a lesser lie"¹⁴² by many participants suggests that HIV is among those issues where there is a degree of difference in the meaning of "responsibility", particularly as it relates to contested truths,

¹³⁹ *R. v Konzani (Feston)* (n 88) [42].

¹⁴⁰ Ryan, 'Disclosure and HIV Transmission' (n 28) 402.

¹⁴¹ Participant 401353-401344-41613134

¹⁴² Participant 401353-401344-42348620

varying degrees of knowledge, and personal experience. Relatively few participants discussed instances of deception where there was a divergence between the risk of transmission and the risk communicated, although reference to this by a small number of participants suggests that this practice does occur:

“I know guys who have put undetectable when they have been detectable (probably to avoid stigma and to make it easier to meet guys as they are more likely to meet someone who his undetectable and therefore at a very low risk of getting HIV). Some guys don't have their HIV status on their profile which makes me think why?”¹⁴³

In addition to these concerns, also notable across the responses was the extent to which deception and disclosure of HIV status were perceived to be distinct from other issues relating to the disclosure of sexual health information. The fourth scenario, in particular, addressed whether there were differing attitudes towards the disclosure other sexually communicable infections¹⁴⁴ compared to HIV. As noted in Chapter 5, responses here suggest that disclosure of non-HIV STIs is highly unusual:

- “I can't imagine any man disclosing on his profile that he had tested positive for an STI other than HIV status. Ever.”¹⁴⁵
- “Never in several several years of using the app have I seen someone declare anything other than HIV in their profile.”¹⁴⁶

Despite this being the case, a small number of participants discussed potential legal duties relating to the disclosure of non-HIV STIs, including between application users. One participant, for instance, stated that disclosing a gonorrhoea infection would be the ‘right thing to do and [it would be] illegal if not

¹⁴³ Participant 401353-401344-40688721

¹⁴⁴ The example used here being gonorrhoea.

¹⁴⁵ Participant 401353-401344-43537049

¹⁴⁶ Participant 401353-401344-42790768

mentioned'.¹⁴⁷ This is notable for two reasons; firstly, as many applications continue the HIV specificity I discussed previously; and, secondly, because case law on non-HIV STI transmission is limited.

As noted in Chapter 2, although the decisions in *Dica* and *Konzani* opened the way for prosecutions relating to other STIs there has, to date, been little expansion of the use of the criminal law in this respect. A small number of cases, predominantly relating to herpes transmission, as well as the notable case of *Marangwanda* involving the (supposedly non-sexual)¹⁴⁸ transmission of gonorrhoea, have seen the application of HIV transmission case law in this way.¹⁴⁹ However, this application has been limited and it can be suggested that there is a degree of HIV exceptionalism in the current approach of the criminal law. Francis and Francis have suggested that:

HIV is thus a problematic model from which to generalize about criminalization of behavior that risks disease transmission. Indeed, HIV exceptionalism is even a problematic model for HIV. Not surprisingly, patterns of criminalization are quite different for many other diseases, as well as for refusals of vaccination or other preventive measures.¹⁵⁰

Although this piece has focused on the ongoing role of criminalisation of HIV transmission and how this might influence and be influenced by the design and use of mobile dating applications and the disclosure features introduced on them,

¹⁴⁷ Participant 401353-401344-42179581

¹⁴⁸ Although the facts of the case and commentary from prosecuting counsel, which is recorded in the appeal case report, suggest that the basis of plea was, in the words of counsel, a “fudge”. See *R v Marangwanda (Peace)* [2009] EWCA Crim 60.

¹⁴⁹ *R v Marangwanda (Peace)* (n 148); Kilian Dunphy, ‘Herpes Genitalis and the Philosopher’s Stance’ (2014) 40 *Journal of Medical Ethics* 793; James Roebuck, ‘Criminal Liability for Transmission of Herpes Simplex Virus.’ (2014) 78 *Journal of Criminal Law* 294; The Law Commission, *Reform of Offences Against The Person* (Law Com No 361 2015), in particular, at 142, footnote 67.

¹⁵⁰ Leslie P Francis and John G Francis, ‘Criminalizing Health-Related Behaviors Dangerous to Others? Disease Transmission, Transmission-Facilitation, and the Importance of Trust’ (2012) 6 *Criminal Law and Philosophy* 47, 54.

this is done with the broader awareness that the development of the criminal law in this area is likely to shape and be shaped by future developments in both sexually and non-sexually communicable infections.¹⁵¹ However, it is suggested that the HIV exceptionalism seen in the responses here highlights how, in the context of HIV transmission, people living with HIV continue to be presented as the “agents of infection” transmitting the virus to their “passive victims”,¹⁵² to a degree not seen with all other communicable infections.

This distribution of agency, which is decidedly one-sided, understates the agency of those who are HIV-negative and is liable, as evidence is presented to juries at trial, to result in significant injustices as prosecutors aim to place responsibility for preventing HIV transmission solely with those who are HIV+.¹⁵³ Representation of those who are HIV-negative as passive and uncritical of the representations of HIV status made on mobile dating applications does not take into account the extent to which those who engage with the HIV disclosure features discussed here do appear not to be gullible in light of expected deception on these applications, along with awareness of window periods and the fallibility of even “known” HIV statuses.

Given the extent to which responsabilisation of HIV prevention appears to place a burden upon PLWHIV to know the importance of their HIV status to others, often in spite of the effectiveness of treatment as prevention, evidence taken from mobile dating applications might, it is suggested, represent an oversimplification

¹⁵¹ See discussion in Nicholls and Rosengarten (n 93) 41–42.

¹⁵² Weait, *Intimacy and Responsibility: The Criminalisation of HIV Transmission* (n 10) 44.

¹⁵³ Matthew Weait, ‘Taking the Blame: Criminal Law, Social Responsibility and the Sexual Transmission of HIV’ (2001) 23 *Journal of Social Welfare and Family Law* 441, 452.

of the complex ways in which dating application users navigate experiences of risk taking, safety and sexual agency which some of the data presented here appears to capture. It is argued that the particular cultural and social status of HIV means that a degree of HIV exceptionalism is placed onto the disclosure and non-disclosure expectations, both of mobile dating application users in this context and more broadly in the societal attitudes towards responsibility for disease transmission, where it exists.

As a result, active deception and passive non-disclosure may, in part as a result of the disclosure obligations discussed above, be too closely interrelated for evidence taken from mobile dating applications to coherently distinguish between culpable and non-culpable behaviour. In the context of a jury trial, the analysis presented here suggests that if the (criminal) law relating to the transmission of sexually communicable infections continues to be punitive and constructed, predominantly, around HIV transmission risk, these cultural expectations are likely to produce significant social and sexual injustices if dating application evidence is presented uncritically. The responsibility that these cultural expectations encapsulate is unlikely to assist in developing health equality and is flawed as a general basis for the development of just criminal law.

6.6 Concluding Remarks

In this chapter, I have explored the manner in which participants drew on conceptions of responsibility in their accounts of dating application use, HIV status disclosure and their understanding of the criminal law in this area. I have suggested that “responsibility” in this context does not represent a neutral, objective, reality but instead a one-sided concept which, in turn, produces

significant sexual inequality and may hamper efforts to reduce HIV transmission, encourage communication between prospective sexual partners, and achieve sexual justice.

In the first section, I outlined how participants spoke of responsibility predominantly as an ethical prerogative which encouraged, if not obligated, HIV disclosure with only minor distinctions made between scenarios involving different levels of risk. Whilst this was by no means a universal experience of the participants who responded to the data collection survey, it was nevertheless a predominant view across much of the data collected. Building on the accounts of safety and risk, discussed in Chapter 4, I suggested that responsibility was disclosure-centric owing to the ways in which it drew on accounts of safety as an ongoing and continuing imperative in participants' accounts of sexual life. I also highlighted the ways in which this responsibility was individualistic, reflecting discourse on sexual life as a private – rather than public – concern. Those writing on the legal theory surrounding HIV transmission, same-sex sexual activity and queer life more generally have also noted the role of individualisation narratives, similar to those identified here.¹⁵⁴ This has a relevancy both in socio-political terms, as debates on the availability of HIV treatment and prevention drugs continue to make distinctions between these medical needs and others which are framed as “public” goods rather than the necessities of individual sexual

¹⁵⁴ Joshi (n 41); Ashford (n 42); Halperin (n 24).

agents,¹⁵⁵ but also in criminal law where issues relating to the distribution of responsibility for HIV prevention remains a debated legal issue.¹⁵⁶

Focusing on the debate surrounding the existence of a *de facto* need for disclosure,¹⁵⁷ I then argued that the impact of responsabilisation's individualism could be seen in the uneven distribution of responsibility for preventing HIV transmission between sexual partners. I went on to argue against an "effective duty of disclosure" and against the presumption that non-disclosure is "incongruous" with honesty. Instead, I suggested that modern sexual ethics needed to acknowledge the developments in cultural awareness surrounding HIV, developments in testing, treatment and prevention, and the immateriality of disclosure to many modern modes of reducing transmission. Instead, at present, it might be suggested that cultures of surveillance exist, which incorporate societal wide monitoring,¹⁵⁸ as well as forms of self-surveillance,¹⁵⁹ and the forms of community level surveillance seen across the dating applications investigated here.¹⁶⁰

Developing on the discussions of culpability and wrongdoing which arose in the data collected here, the chapter then highlighted the uneven and inconsistent

¹⁵⁵ Alexander Maine, 'Bareback Sex, PrEP, National AIDS Trust v NHS England and the Reality of Gay Sex' [2019] *Sexualities*; Mowlabocus (n 38).

¹⁵⁶ See Weait, 'Knowledge, Autonomy and Consent: R v Konzani' (n 18); Cherkassky (n 6); Ryan, 'Disclosure and HIV Transmission' (n 28); Clough (n 57), among others.

¹⁵⁷ Ryan, "'Active Deception" v Non-Disclosure: HIV Transmission, Non-Fatal Offences and Criminal Responsibility' (n 53) in particular, note 24; Weait, 'Knowledge, Autonomy and Consent: R v Konzani' (n 18) 767.

¹⁵⁸ Guta, Murray and Gagnon (n 72); Alexander McClelland, Adrian Guta and Marilou Gagnon, 'The Rise of Molecular HIV Surveillance: Implications on Consent and Criminalization' [2019] *Critical Public Health*.

¹⁵⁹ van Doorn (n 16).

¹⁶⁰ Giles (n 50).

awareness of the criminal law discussed by participants. In line with previous findings which suggest that awareness of the criminal law governing HIV transmission is low among men who have sex with men,¹⁶¹ I found here that few participants had a comprehensive understanding of the law governing HIV transmission. It was notable that the majority of those who drew on aspects of the criminal law did so to reinforce expectations of disclosure and models of sexual responsibility dependent on it. Few participants identified alternatives to disclosure as a way of avoiding criminal liability, however, these alternatives were addressed in some responses which highlighted the complex interrelationship between the criminal law and ethical and moral obligations surrounding HIV transmission and prevention.

In the final section of the chapter, I discussed the different ways participants positioned disclosure, non-disclosure and deception as active and passive actions on the part of dating application users. This highlights the various ways that information in profiles might be misinterpreted at trial and the extent to which some participants acknowledge *degrees of deception and dishonesty*, which emphasises the role of dating application users as an active and critical audience of disclosed HIV-statuses, rather than as “passive” recipients of information. I suggested that the design of mobile dating applications presents the socially and morally complex issue of HIV disclosure as a relatively simple endeavour, which may be over relied upon at trial in order to establish culpability.

¹⁶¹ Dodds, Bourne and Weait (n 96); Phillips and Schembri (n 96).

Chapter 7: Conclusion

7.1 Introduction

The criminalisation of disease transmission in England and Wales is not limited to the transmission of HIV. Yet, the limited number of prosecutions relating to other communicable diseases, all of which have been sexually transmittable, results in a socio-legal context which has unique *social* and *legal* challenges linked to HIV and AIDS. Through the analysis of the data collected in this project, I have demonstrated that the specific experiences of mobile dating application users and the context specific knowledge and beliefs that these experiences produce can inform legal analysis and offer new ways to interpret (legal) concepts such as risk, disclosure and responsibility. In this final chapter, I provide an overview of the project as a whole, summarise each of the preceding chapters, and comment on the contribution to knowledge made by this thesis, as well as on issues which future research projects may wish to address.

The background to this project was introduced in Chapter 1. Here, I highlighted the contentious nature of HIV transmission criminalisation and discussed the social functions of the criminal law as they relate to HIV transmission offences. I noted that allegations of deception and (non-)disclosure may be particularly challenging to establish in the course of criminal proceedings and emphasised the potential that online mobile dating applications have in this regard. HIV disclosure features found on mobile dating applications, which mirror and build upon HIV disclosure features found on dating websites, have proliferated in recent years during the period when dating “apps” can be said to have reached the mainstream.

Race and Robinson have both discussed the use of the disclosure features found on websites and have argued that these features contribute to specific disclosure expectations and practices which differ between different sites.¹ My findings, which I summarise below, demonstrate that disclosure features of the kind found on several popular mobile dating applications – including Grindr and Hornet – also produce norms, beliefs and attitudes which might be described as contextually contingent. In contrast to other dating applications and websites, the approach taken to sexual health by the applications investigated in this project is one which is exclusively focused on disclosure of status and test history as *the* means of HIV prevention, without addressing condom use or alternative risk reduction techniques.² The focus of this thesis was, therefore, to investigate the impact of these HIV and test history disclosure features on legal concepts including disclosure, non-disclosure and deception. This aim was captured in the overall research question of the project, which was:

How are HIV disclosure features on dating apps understood, and how might these context dependent understandings shape the criminalisation of HIV transmission in England and Wales?

Given the relatively recent introduction of the HIV disclosure features I investigate, it is perhaps unsurprising that there is only limited literature addressing their use, particularly from a legal perspective. However, given the critical impact that evidence of deception or non-disclosure of HIV status might have on a defendant's culpability, understanding how these specific features are

¹ Kane Race, 'Click Here for HIV Status: Shifting Templates of Sexual Negotiation' (2010) 3 *Emotion, Space and Society* 7; Brandon Andrew Robinson, 'Doing Sexual Responsibility: HIV, Risk Discourses, Trust, and Gay Men Interacting Online' (2018) 61 *Sociological Perspectives* 383.

² Chris Ashford, 'Bareback Sex, Queer Legal Theory, and Evolving Socio-Legal Contexts' (2015) 18 *Sexualities* 195, 196; Chase Ledin and Kristian Møller Jørgensen, 'Viral Hauntology', *Viral Masculinities* (Exeter Masculinities Research Unit 2020).

understood and what expectations exist in respect of them is a significant and pressing legal issue which this thesis has addressed through its analysis of data collected from over 100 application users.

In the remainder of this concluding chapter, I reflect on the original contribution made by this thesis and identify the emerging issues which future work may wish to address. Online applications continue to be a major component in the social, romantic and sexual lives of many men who have sex with men, and the disclosure features they now incorporate play a critical role in shaping what it means to have sex safely (or not), to disclose HIV (or not), and be sexually responsible (or not). This provides new ways of engaging with legal concepts such as deception and disclosure, culpability and duty, which future HIV transmission cases will inevitably need to engage with if transmission continues to be criminalised.

Of course, there have been recent developments which can be described as world-changing, without hyperbole, in respect of social and legal responsibility for disease transmission. The COVID-19 epidemic occurred after the data in this project was collected and first analysed, but the outbreak and social and governmental responses to it have been a major point of reflection during the writing up stage. Given the potential legal and socio-legal issues arising out of the COVID epidemic, it is hoped that work such as this, which explores the legal responses to disease transmission, to date, in England and Wales and the increasing role of technology in this process, is of inspiration to others researching in this area.

7.2 Existing Literature

Chapter 2 provided a review of the existing literature on the criminalisation of HIV transmission and the broader criminalisation of disease transmission in England and Wales. Although the criminalisation of HIV transmission continues to be an issue of contention, the existing debate is well established.³ Proponents of criminalisation draw on concepts such as social and sexual responsibility and highlight the perceived necessity of disclosure so that HIV-negative individuals are informed and educated about transmission risks. These arguments have been subject to significant critiques within existing literature and I have added to arguments against criminalisation by highlighting their individualistic and simplistic nature. In England and Wales, the development of the current legal framework addressing HIV transmission has followed an uneven and unsteady path of development through case law, proposed legislative action and social and political debate.⁴ Almost contemporaneously with the beginning of my doctoral studies, Daryll Rowe was convicted of intentionally transmitting HIV to sexual partners met on mobile dating applications.⁵ Rowe's appeal and the public,⁶ as well as academic,⁷ attention it has received were not the initial inspiration behind this research and the issues it addresses. These developments have,

³ See, for general analysis, Jonathan Herring, *Great Debates in Criminal Law* (4th Edn, Red Globe Press 2020) 72–86.

⁴ See, in general, The Law Commission, *Reform of Offences Against The Person* (Law Com No 361 2015) ch 6.

⁵ *R v Rowe* [2018] EWCA Crim 2688.

⁶ See, for instance, Charlotte Charlton, 'The Man Who Used HIV as a Weapon' (*BBC Three*, 15 March 2019).

⁷ Matthew Weait, 'Daryll Rowe Guilty – but Is Criminal Law the Right Way to Stop the Spread of HIV?' (*The Conversation*, 16 November 2017) <<https://theconversation.com/daryll-rowe-guilty-but-is-criminal-law-the-right-way-to-stop-the-spread-of-hiv-85488>> accessed 6 April 2020; in addition to my own commentary, Cameron Giles, 'Daryll Rowe's Sentence Could Change the Law's Approach to HIV Transmission' (*The Conversation*, 19 April 2018) <<https://theconversation.com/daryll-rows-sentence-could-change-the-laws-approach-to-hiv-transmission-95307>> accessed 15 August 2018.

nevertheless, reframed and highlighted many of the issues which stood out when developing my initial proposal.

Although it might be suggested that the primary ratio of *Rowe* was that the earlier cases of *Dica* and *Konzani* continue to apply and that s.18 OAPA charges are indeed appropriate where transmission was intentional,⁸ arguably one of the significant implications of the case as a whole was the link between messages sent by the defendant – via text and application – stating that he was “clean” and the successful allegations of intent by the prosecution.⁹ In this respect, *Rowe* fits into a growing corpus of case law which explores the relationship between non-disclosure of information and the “active” deception of others through both direct communication and indirect omission, most notably seen in the gender identity cases which have shaped the literature addressing “sexual fraud” over recent years.¹⁰ Although I have suggested that sexual fraud literature is relevant to the evolution of HIV criminalisation, I also argued that HIV criminalisation presents particular challenges. What is particular about HIV transmission in the context of sexual fraud is that, unlike the offences seen in *McNally*, *Newland*, and other cases, failure to disclose known HIV status does not vitiate consent to sexual activity.¹¹ The focus on harm, in the form of GBH, instead of sexual consent and the application of ss 74-76 SOA 2003, introduces unique standards placed upon

⁸ *R v Dica* [2004] EWCA Crim 1103 [58]; *R v Konzani (Feston)* [2005] EWCA Crim 706 [41].

⁹ See *R v Rowe* (n 5) [15]-[19], [68].

¹⁰ *R v McNally* [2013] EWCA Crim 1051; *R v Newland* [2017] (Unreported); Alex Sharpe, ‘Expanding Liability for Sexual Fraud Through the Concept of ‘Active Deception: A Flawed Approach’ (2016) 80 *The Journal of Criminal Law* 28; Alex Sharpe, ‘Queering Judgment’ (2017) 81 *The Journal of Criminal Law* 417; Samantha Ryan, ‘“Active Deception” v Non-Disclosure: HIV Transmission, Non-Fatal Offences and Criminal Responsibility’ [2019] *Criminal Law Review* 4.

¹¹ *R v EB* [2006] EWCA Crim 2945 [40]; Karl Laird, ‘Criminal Law Review Rapist or Rogue? Deception, Consent and the Sexual Offences Act 2003’ [2014] *Criminal Law Review* 492, 502–503.

PLWHIV, as well as conceptual challenges surrounding principles of risk and responsibility. Consequently, what this thesis has sought to establish is the relationship between these concepts and the disclosure features seen on applications.

7.3 Employing an Online Methodology

This thesis has explored these issues by employing a qualitative methodology which develops on earlier literature addressing online, visual and narrative driven research. As discussed in Chapter 3, the visual vignette technique used shares some similarities with other projective approaches, such as story completion tasks,¹² but the visual elicitation component is distinctive – reflecting the visual nature of the issues under investigation. Combining this approach with an online survey method, which presents fewer barriers in projects where participants need to have internet access to be eligible, facilitated the collection of a rich set of data. In contrast to other legal research which has explored HIV disclosure and non-disclosure, including from a social-legal perspective, this empirical component sought to identify and analyse the conceptual complexity of disclosure, non-disclosure and deception, rather than focus on past experiences of participants or patterns of behaviour exclusively.

There are specific limitations to this project stemming from the methods and methodology used, including the focus on concepts and participants' understanding rather than their past behaviour and experiences. Although it

¹² See, among others, Victoria Clarke and others, 'Editorial Introduction to the Special Issue: Using Story Completion Methods in Qualitative Research' (2019) 16 *Qualitative Research in Psychology* 1.

should be acknowledged that the way we conceive and understand specific issues inevitably has an influence on our behaviour, and past experience subsequently shapes our understanding,¹³ the approach taken here focuses on the former. Whilst I have discussed certain practices, such as avoidance, which emerged from the data, I have not argued that these practices are commonly enacted, but rather demonstrated how participants' discussion of them is indicative of the construction of concepts such as safety. Although this limitation should be acknowledged, I would argue that the value of the data collected is reflected in the analysis I have set out and provides a foundation for future research which may wish to investigate how these concepts are reflected in specific enacted practices.

As a contribution to scholarship on online methodologies, this project presents a timely example of how investigation of online phenomena can incorporate online recruitment and data collection whilst avoiding ethical concerns surrounding non-participant data, expectations of privacy and lack of informed consent which have been noted in broader social media research.¹⁴ The visual vignette, as a tool for the investigation of social media sites with an emphasis on visual components, avoids several of these concerns. Whilst it may require greater familiarity with the site under investigation when compared with other approaches, such as the "digital walkthrough",¹⁵ it also allows for a focus on specific issues of interest to

¹³ Victoria Clarke, Virginia Braun and Kate Wooles, 'Thou Shalt Not Covet Another Man? Exploring Constructions of Same-Sex and Different-Sex Infidelity Using Story Completion' (2015) 25 *Journal of Community and Applied Social Psychology* 153, 156.

¹⁴ See, for example, Wasim Ahmed, Peter A Bath and Gianluca Demartini, 'Using Twitter as a Data Source: An Overview of Ethical, Legal, and Methodological Challenges' in K Woodfield (ed), *Advances in Research Ethics and Integrity* (Emerald 2017).

¹⁵ Kath Albury and others, 'Data Cultures of Mobile Dating and Hook-up Apps: Emerging Issues for Critical Social Science Research' (2017) 4 *Big Data & Society* 1, 9.

the researcher, rather than a reliance on those issues naturally emerging during the time when a participant is recording their application use, for instance in a diary based study, or during interviews, in a walkthrough based study. Although it is more narrowly focused than an open-ended interview question, it is distinct from closed-ended vignettes,¹⁶ giving participants some control over the focus of their responses.

7.4 Chronotopes of Risk and Safety

After setting out, in Chapters 2 and 3, the existing literature addressing HIV transmission criminalisation and the methodology used in this project, Chapters 4 to 6 presented an analysis of the data. HIV transmission is often understood in terms of risk-taking and risk-avoidance behaviours carried out by individuals, with less emphasis on the social factors that influence transmission, testing and treatment.¹⁷ In a legal context, the perceived risk associated with people living with HIV is used to justify the imposition of the criminal law, intending to reduce the harms caused by this group to those who are HIV-negative.¹⁸ Chapter 4 examined risk and its potential antonym, safety, and explored how these were understood by participants in their responses to the visual stimuli. The analysis of these concepts highlighted how each was dependent upon its own distinct way of conceptualising space and time and that this contributed to different duties, responsibility and assumptions associated with risk, safety and other concepts such as stigma and avoidance.

¹⁶ See Alan Bryman, *Social Research Methods* (5th edn, Oxford University Press 2016) 259–260.

¹⁷ Tyler M Argüello, 'Fetishizing the Health Sciences: Queer Theory as an Intervention' (2016) 28 *Journal of Gay and Lesbian Social Services* 231.

¹⁸ Matthew Weait, *Intimacy and Responsibility: The Criminalisation of HIV Transmission* (Routledge-Cavendish 2007) 120–132.

In making this argument, Chapter 4 drew upon Valverde's analysis of the chronotope, a literary technique most closely associated with Mikhail Bakhtin, as a form of socio-legal analysis.¹⁹ This chapter demonstrated how the chronotope and similar forms of spacio-temporal analysis could be used to examine the ongoing and cyclical nature of safety, as well as the duties and obligations that calls for safe behaviour give rise to, and the linear and chronological nature of risk, with its emphasis on cause and event. Furthermore, whilst the spatial element of chronotopes have traditionally focused on particular geographies, such as public entertainment venues,²⁰ the queues of drug rehabilitation centres,²¹ and, in other fields, school learning environments,²² this piece contributed to the emerging body of literature addressing chronotopes within legal and law-related concepts, as seen in Harrington's work on chronotopes in medical law and Kotiswaran's analysis of post-colonial legal theory.²³ Looking at chronotopes operating at the level of individuals, as well as within concepts, this chapter argued that the temporalities of risk and safety seen in the data has a particular relevancy to socio-legal debates on HIV prevention, responsibility and public health.

Another key argument of this chapter was that the disclosure features seen on applications rely on particular emotional attitudes towards risk, safety and sexual

¹⁹ Mariana Valverde, *Chronotopes of Law: Jurisdiction, Scale and Governance* (Routledge 2015).

²⁰ Dawn Moore and Mariana Valverde, 'Maidens at Risk: "Date Rape Drugs" and the Formation of Hybrid Risk Knowledges' (2000) 29 *Economy and Society* 514.

²¹ Suzanne Fraser, 'The Chronotope of the Queue: Methadone Maintenance Treatment and the Production of Time, Space and Subjects' (2006) 17 *International Journal of Drug Policy* 192.

²² Kristiina Kumpulainen, Anna Mikkola and Anna Mari Jaatinen, 'The Chronotopes of Technology-Mediated Creative Learning Practices in an Elementary School Community' (2014) 39 *Learning, Media and Technology* 53.

²³ See Prabha Kotiswaran, 'Valverde's Chronotopes of Law: Reflections on An Agenda for Socio-Legal Studies' (2015) 23 *Feminist Legal Studies* 353; John Harrington, 'Time and Space in Medical Law: Building on Valverde's Chronotopes of Law' (2015) 23 *Feminist Legal Studies* 361.

responsibility. This chapter highlighted the importance of emotion, often linked with a desire for safety and to avoid risk, suggesting that emotion was critical to understanding how evidence taken from applications might have an appeal to juries. The analysis of the emotion in participants' accounts reveals how the genuine concerns that application users have around *feeling* as well as *being* safe, can support claims of conditional consent. Taking into consideration the evolution of sexual fraud case law, this might well have a significant impact on how application derived evidence is presented to juries in criminal proceedings including in relation to juries' assessments of witness credibility.²⁴

7.5 Consent, Material Facts and Disclosure

Many of these issues continued to be explored in Chapter 5, which offered a critique of the ways in which conditional consent and materiality is deployed in relation to sexual health, and more broadly in relation to sexual activity in criminal law literature. Drawing on the work of Fischel and others, it was argued that there are significant limitations inherent in addressing the complex reality of HIV transmission through the narrow legalistic framework of consent. Through an analysis of participants' responses and literature on gender identity case law, Chapter 5 suggested that the highly contractual manner in which consent is deployed by those who advocate a "conditional consent" model has flaws, particularly when certain intricate and nuanced factors, such as gender identity or HIV status, are prioritised as "material", or otherwise important, facts over

²⁴ See Hlavka and Mulla's work on the presentation of text messages in sexual offence cases in the US: Heather R Hlavka and Sameena Mulla, "That's How She Talks": Animating Text Message Evidence in the Sexual Assault Trial' (2018) 52 Law and Society Review 401.

others which may be of equal, or greater, importance to those engaging in sexual activity.

For instance, it was suggested that few would argue that “misrepresentation” of sexual orientation, itself a highly complicated and often contested social construct,²⁵ could be held to the same standards of “materiality” as gender identity or HIV status, despite the reality that these factors may be equally relevant to sexual decision making. Building on this point and the analysis of emotion in Chapter 4, a further focus of Chapter 5 was the manner in which trust is deployed in legal analysis of sexual consent, particularly consent to risk. It was argued that trust is used as a framing device, positioning those who are HIV-negative as vulnerable, underinformed and susceptible to deception and people living with HIV as knowledgeable and aware of the importance of their HIV status to their partners – often irrespective of transmission risk.

Suggesting that legal analysis of consent to HIV transmission risk is often detached from the practical realities of sexual activity, communication and decision making, Chapter 5 also considered the argument put forward by some participants that those who are HIV-negative have an (often unconditional) “right to know” and “right to ask” about their partner’s HIV status in order to protect their own sexual health. This discussion served to highlight the manner in which the conflation of active deception and non-disclosure is justified by the exceptionalism of HIV-positivity and the normative status of HIV-negativity.²⁶ This

²⁵ Mariana Valverde, *Law’s Dream of a Common Knowledge* (Princeton University Press 2003) 223.

²⁶ On active deception versus non-disclosure, see Ryan (n 10).

point was reinforced by the analysis of participants' accounts which highlighted that the disclosure of sexually communicable infections other than HIV was rarely expected by those who participated in the project.

7.6 Responsibilisation, HIV Transmission and Sexual Ethics

This analysis of the exceptionalism of HIV infection and assumed knowledge of people living with HIV also preceded the argument, presented in Chapter 6, that knowledge operates as a burden to those diagnosed with a sexually transmitted infection. I demonstrated how positive disclosure obligations, beyond what is necessary to reduce transmission risk, reflects beliefs relating to sexual citizenship, social duty and ethical responsibility.²⁷ Participants' discussion of ethical obligations highlighted how the criminal law may continue to evolve in this area. It remains possible that the concept of sexual fraud, developed in gender "deception" cases, may be applied in the context of HIV transmission. "Common sense" thinking,²⁸ the concept of "conditional consent" based on the assumptions of the HIV-negative, and arguments about trust and deception open up the possibility for unwarranted use of the criminal law in situations where transmission risk is extremely low or absent/hypothetical.

Chapter 6 also considered participants' awareness of the current legal framework on HIV criminalisation, demonstrating that there continued to be a degree of confusion and misunderstanding over when disclosure is and is not required,²⁹

²⁷ See Valverde (n 25) 169–172; as well as, Joachim J Savelsberg, 'Law's Dream of a Common Knowledge (Review)' (2006) 31 *The Canadian Journal of Sociology* 270.

²⁸ Valverde (n 25) 169–172.

²⁹ Catherine Dodds, Adam Bourne and Matthew Weait, 'Responses to Criminal Prosecutions for HIV Transmission among Gay Men with HIV in England and Wales' (2009) 17 *Reproductive Health Matters* 135; Matthew D Phillips and Gabriel Schembri, 'Narratives of HIV: Measuring

and suggesting that this may also contribute to the expectation of disclosure reported by participants, as well as to the framing of non-disclosure as deceptive, dishonest and *irresponsible*. Building on earlier chapters, it was argued that responsibility was utilised by participants, in both legal and also non-legal ways, to frame sexual ethics around a particular expectation of “good, responsible” sexuality which was individualistic and unevenly distributed between those living with HIV and those not. The extent to which this good, responsible sexuality, conducted in private between autonomous, rational agents, produces – in practical terms – an ongoing obligation of disclosure, I argued, left open the possibility that where application evidence is drawn upon in criminal proceedings, and the failure to meet and maintain “responsible” standards of behaviour – by not proactively disclosing known HIV status, irrespective of transmission risk, in a profile – may have an impact on jurors’ assessment of defendants.

Reflecting on the development of HIV transmission criminalisation in England and Wales, the focus on the harm seen in transmission and the extent to which this harm is interpreted as a public wrongdoing, rather than a matter of private dispute between sexual partners, Chapter 6 concluded by returning to the distinctions between HIV transmission offences and gender identity deception cases discussed in Chapter 2. I argued that literature on sexual fraud demonstrated some arguments which may also be applied in HIV transmission cases, pointing out that application use could influence the criminalisation of HIV transmission and extend it beyond the approach to culpability seen to date. However, as I indicated in the introductory section, although evidencing sexual fraud through

Understanding of HIV and the Law in HIV-Positive Patients’ (2016) 42 *Journal of Family Planning and Reproductive Health Care* 30.

reference to dating application profiles may be an appealing prospect on first inspection, the complex interrelationship between the themes demonstrated in this project presents challenges to the crown and not simply the defendant.

7.7 Limitations

This project has identified and scrutinised a number of core concepts relating to the disclosure and non-disclosure of HIV and the prosecution of those who intentionally or recklessly transmit HIV to their sexual partners. But, several limitations to the findings summated in this section must be acknowledged. The most significant limitation of this project is perhaps the result of the recruitment strategy adopted and the subsequent makeup of the 102 participants who took part in the research. Whilst there was diversity among the group in respect of age and duration of application usage, diversity which might be all the more significant considering the extent to which the population of application users is itself limited, the characteristics of these participants produce a number of limitations and highlight where future research may building upon and develop the arguments that have been presented here.

Firstly, a very small proportion of participants disclosed living with HIV in the survey and, whilst it remains possible that other participants may have been living with HIV and opted not to disclose this, the limited extent to which these findings address the expectation, assumptions and conceptualisations of PLWHIV presents an opportunity for future research to address both how profiles are interpreted, and indeed constructed, by PLWHIV specifically. Instead the analysis here identifies the key concepts which are drawn upon by those who are HIV-when engaging with app profiles and highlights how avoidance and stigmatising

attitudes which are likely specific to those who are HIV- interact with disclosure and safety expectations.

Secondly, it must be noted that due to the recruitment approach taken, particularly the use of application-based recruitment, the group of men who participated in the project are likely to reside in England, outside of London – where a period of attempted recruitment was generally unproductive. In addition to the filtering question during the initial stages of the survey which excluded those who had not used dating apps in England and Wales, these conditions mean that the findings may not reflect the experiences of application users in other locations, particularly those internationally. As the project investigated HIV criminalisation in the context of England and Wales the lack of an international perspective may be less significant than the limited recruitment from London and Manchester, although in the latter case there was some success in recruitment via social media. The particularities of these two locations and the high proportion of application users in these cities with some of the largest gay scenes in the UK, something which may have itself impacted application recruitment efforts, itself warrants further research which, as I will discuss below, may also want to consider the use of applications specifically in the context of gay nightlife venues.

In addition to these limitations brought about by the recruitment process, it should be noted that the design of the visual vignettes and the exploration of the disclosure features on applications, generally, is limited owing to the ongoing development and use of these features beyond the time at which the data

collection was designed and carried out.³⁰ Although the visual vignette method develops on the story completion and vignette methods outlined in Chapter 2 and online research methods generally, the static nature of the mock profiles may be less suited to future research on mobile dating applications particularly when many apps continue to introduce new features such as multiple profile images, links to social media accounts, and greater integration with other applications and messaging services, which will warrant development of the visual vignette method if it is used in future. As I discuss below, future research and applications themselves will also need to address the changing nature of HIV both in general, and in the UK context where reduced infection rates and public provision of PrEP have both made a significant impact during the latter stages of this project.

7.8 Remaining and Emerging Issues

This thesis has sought to pre-empt, rather than simply analyse, the influence of mobile dating applications on HIV criminalisation and their potential use in criminal proceedings. I have addressed how these features are understood by those who use them and how this influences legally pertinent concepts such as risk, disclosure and responsibility. I have also reflected upon the evolution of the criminal law in this area and identified new areas of potential socio-legal debate, particularly relating to the concepts of “conditional consent” and “material” facts. Future work may wish to consider how these issues unfold in the course of specific criminal proceedings. Although the circumstances of *Rowe* offer an initial

³⁰ See, for instance, recent developments where dating applications have moved into the online spaces which they were previously distinct from: Josh Milton, ‘Grindr Web: Here’s How to Use Grindr on Your Computer Desktop’ (*Pink News*, 5 May 2020) <<https://www.pinknews.co.uk/2020/05/05/grindr-web-desktop-computer-laptop-app-what-is-how/>> accessed 5 May 2020.

insight into how application evidence may be used, the particular facts of that case, and in particular the intent which Rowe demonstrated, do not reflect the particular complexities of disclosure and non-disclosure which have been the focus of this thesis. Future research exploring the evolution of these issues at first instance and appeal levels may wish to consider how evidence is used or not used to forward arguments around sexual responsibility and disclosure and consent, such as those discussed in the literature and here.

Future research should explore in detail the particular experiences of PLWHIV and their perspectives on creating and using profiles on applications. Additional literature on projective techniques, similar to the visual vignette technique outlined in Chapter 3, has suggested that larger scale projects seeking to compare different groups of participants can adopt a quasi-experimental design, comparing responses between two groups quantitatively as well as qualitatively.³¹ Future research may wish, therefore, to utilise the visual vignette technique set out here as part of a larger scale comparative method, this would allow for comparisons between the two groups whilst also increasing the generalisability of the findings set out here.

In addition, whilst this thesis has explored the disclosure and non-disclosure of HIV, some of the concepts discussed here have a broader applicability to other sexual health issues. As noted in the introduction and literature review, the criminal law on disease transmission has focused almost exclusively on HIV transmission, although the emerging issues resultant from the ongoing COVID-

³¹ Virginia Braun and Victoria Clarke, *Successful Qualitative Research* (Sage 2013) 146.

19 epidemic may result in an evolution of the criminal law in this area over the coming months and years. Other sexually communicable diseases, including herpes,³² gonorrhoea,³³ as well as hepatitis and syphilis³⁴ are likely to become more pressing legal issues as challenges posed by antibiotic resistance, reduced sexual health funding in some settings, and PrEP provision change the socio-medical landscape.

As noted in the later chapters, participants reported a range of beliefs about how the test history feature of application profiles and profiles more generally were, or were not, used to communicate information about sexual health beyond and distinct from HIV status. Future research may wish to consider further the influence of mobile dating application design upon this wider sexual health context with a particular focus on potential criminalisation of other STI transmission. As applications continue to develop, and there has been some suggestion that applications incorporate more sexual health information into profiles,³⁵ the potential legal implications of mobile dating application use may extend beyond what I have set out here. Other potential updates to applications explored by app developers have included the possible introduction of partner notification features which could be used to inform previous partners of a

³² The subject of limited case law. See James Roebuck, 'Criminal Liability for Transmission of Herpes Simplex Virus.' (2014) 78 *Journal of Criminal Law* 294; *R v Golding (David)* [2014] EWCA Crim 889.

³³ *R v Marangwanda (Peace)* [2009] EWCA Crim 60.

³⁴ Rarely considered in existing case law, but arguably as serious as well as potentially life-threatening

³⁵ Grindr, 'How Can We Improve Your Grindr Experience?: Anonymous STD Alerts' (*Grindr UserVoice*, 2018) <<https://grindr.uservoice.com/forums/912631-grindr-feature-requests/suggestions/34505137-anonymous-std-alerts>> accessed 11 May 2019.

subsequent diagnosis.³⁶ As well as exploring the social, legal and ethical obligations that may potentially arise from the introduction of such features, future research could address the ways in which such features continue to expand the role of surveillance and responsabilisation in online sites.³⁷

7.9 Concluding Remarks

In this thesis, I have focused on a conceptual analysis of risk, disclosure and responsibility as seen in the data collected. I have claimed that this conceptual analysis reveals the temporal limitation of the concepts of consent and risk-taking, highlighting the ways in which the criminal law imposes a framework of responsibility and obligation onto sexual decision making. I have argued that this has significant implications for the law and that there are limitations as to what applications can demonstrate. Highlighting how future research can develop on the original contribution made here, I have shown how online mobile dating applications offer new ways to conceptualise responsibility and culpability, but that care must be taken not to overextend their usefulness.

Care must be taken to ensure that applications and evidence taken from them are not simply used to perpetuate assumptions about who places whom *at risk*, or that people place others at risk at all. Care must be taken to ensure that disclosure obligations are not used to perpetuate stigma directed toward those

³⁶ For further discussion of partner notification in the context of HIV testing, see J Blake Scott, *Risky Rhetoric: AIDS and the Cultural Practices of HIV Testing* (Southern Illinois University Press 2003).

³⁷ On surveillance, see, for instance, Anders Albrechtslund, 'Online Social Networking as Participatory Surveillance' (2008) 13 *First Monday*; Alice E Marwick, 'The Public Domain: Social Surveillance in Everyday Life' (2012) 9 *Surveillance and Society* 378; Kane Race, 'Framing Responsibility: HIV, Biomedical Prevention, and the Performativity of the Law' (2012) 9 *Journal of Bioethical Inquiry* 327.

living with HIV under the guise of *sexual responsibility*. Furthermore, the law should act cautiously when using evidence taken from specific contexts to demonstrate “deception” and “disclosure” in HIV transmission proceedings. Rather than being effective tools for demonstrating these concepts, applications come with their own norms, meanings and consequences for those using them, which the law may be ill equipped to address. Although digital technology has significant potential as a resource for lawyers, there is a need for theorists and practitioners to pay close attention to the ways in which technologies shape and are shaped by the understandings, expectations and assumptions of those who are using them. As such it is necessary that socio-legal analysis of these issues continues to investigate these issues from an empirical, as well as theoretical, position, and it is hoped that this project may offer a foundation for this work.

Appendix 1: Participant Information Sheet Download

Recruitment Information: Dating Application Research Project

You have been invited to take part in a project investigating dating application usage. Please take the time to read through the information below before deciding whether or not to take part. It is important that you understand what the research involves and why it is being conducted.

You do not have to decide immediately and may return to participate at any time until the study closes. If you have any further questions, contact details for the researcher can be found at the bottom of the page.

What is the aim of the study?

This project aims to examine how people who use dating applications construct their profiles and perceive the profiles of others. In particular, we are interested in expectations toward HIV disclosure and how accurate profiles are expected to be.

Why have I been invited to take part?

This project aims to gather responses from people who have used dating application targeted at men who have sex with men, you've been invited to take part because you fall into this group and have expressed an interest in participating.

What will happen if I take part?

If you agree to take part, by clicking the agreement at the bottom of this section, you will be forwarded to a survey. This will consist of a number of fictitious scenarios involving dating application usage. In each scenario you will be asked a number of questions about your perception of the scenario and the people in it. There will also be a few demographic questions to help understand the range of people who have participated in the research.

Do I have to take part?

No. Participation in the research is entirely voluntary. If you do not wish to take part, you can simply close this webpage and disregard the invitation.

You can also withdraw at any point during survey. If you wish to do so, please close the survey without clicking the submit option, this will stop your response from being recorded and analysed.

Are there any disadvantages of taking part in this study?

Your participation in this research will not cause you any particular disadvantage.

How is this research funded?

This research is funded entirely by Northumbria University.

Will my involvement be confidential?

Yes. Any information you provide is considered confidential and will be stored securely. The only exception to this confidentiality is if the researcher feels that you or others may be harmed if the information is not shared. You are not required to give any information which would personally identify you as participating in the study. If you volunteer any personally identifying information, it will be pseudonymised as soon as is possible.

Your completed survey will be assigned a generated ID number that you can find on the last webpage of the study. This ID, pseudonyms, or other generic identifiers, for example "Participant 1",

“Participant 2” and so on, will be used to identify individual responses if they are referenced in published works.

What will happen to the data collected in this study?

The data collected in this survey will be analysed as part of an ongoing PhD project. As well as this, the findings might be reported in an academic journal or at a research conference and may be used in subsequent research projects. However, any data presented in this way will be anonymised and you will not be identifiable. If you would like a summary of the findings, you can email the researcher at the address below.

What do I need to know about my data rights?

Under the EU’s new General Data Protection Regulation, University researchers need to highlight where personal data might be collected from participants and provide information about the legal basis for doing so. All of data collected in this study, including any demographic data, is collected and processed because it is necessary to do so for the research purposes outlined above, which are in the public interest.

Under the GDPR individuals have certain rights relating to their personal data, this includes; a right to a copy of information comprised in their personal data, a right in certain circumstances to have inaccurate personal data rectified, and a right to object to decision being taken by automated means.

If you have additional questions regarding your data rights, you can contact the researcher using the contact details below. Alternatively, you can contact Northumbria University’s Data Protection Officer at dp.officer@northumbria.ac.uk. If at that stage you are not satisfied with the data protection procedures in place, you have the right to complain to the Information Commissioner’s Office. For more information see their website: <https://ico.org.uk>.

How will data relating to this study be stored and processed?

All responses to this survey will initially be stored on the Survey website. When it comes to be analysed, it will be downloaded to the University’s servers, which are password protected.

All data is stored in accordance with University guidelines and the General Data Protection Regulation (GDPR) and Data Protection Act 2018. Data will be stored for a period of up to three years following the completion of the project.

Who can I contact for further information?

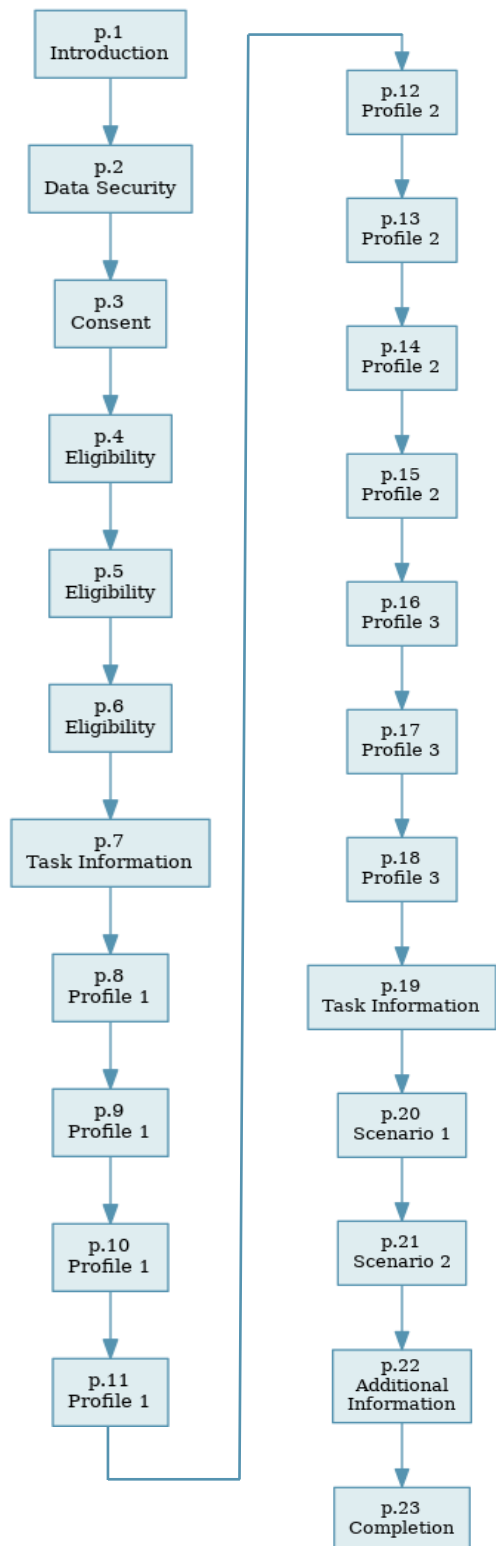
If you have any further questions, please contact the researcher using the following contact information: Cameron Giles, Faculty of Business and Law, Northumbria University, Newcastle, NE1 8ST; Or email: c.a.r.giles@northumbria.ac.uk

What if I want to raise a concern or complaint?

The Faculty of Business and Law Research Ethics Committee, at Northumbria University, have reviewed the study in order to safeguard your interests, and have granted approval to conduct the study.

If you have any concerns, you can contact Professor Chris Ashford, who is supervising this research project (chris.ashford@northumbria.ac.uk). Or alternatively, Business and Law Ethics Director Professor Mary Thomson (mary.thomson@northumbria.ac.uk)

Appendix 2: Online Survey Structure Outline



Profile 1

Question 1: Based on your initial impressions, and your experience of dating apps, write a brief description of the person (or people) who made this profile.

Question 2: You may have noticed that in the top right of this profile, the age given is 27, but in the about me section the number 26 is given, why do you think this is?

Question 3: Following on from the description you have given, can you say some more about the reasons you think this person is using the app, and what suggests this to you?

Question 4: You may have noticed that this user lists their HIV status as "Undetectable" and has put the first of September in the Test History section. What are your thoughts on this person's HIV status, and what do you think the Test History section tells you (if anything)?

Profile 2

Question 1: Based on your initial impressions, and your experience of dating apps, write a brief description of the person (or people) who made this profile.

Question 2: The person(s) who created this profile has opted to complete fewer of the categories than the person(s) in the first profile you saw. Why do you think this is, and why do you think they have chosen the particular categories that are completed?

Question 3: As you can see, the about me section of this profile contains quite a few emoji symbols. What meanings do you think these symbols carry, if any?

Question 4: The HIV Status and Test History sections of this profile have been left blank. Why do you think this is? Do you have any thoughts on this person's sexual health from looking at their profile?

Profile 3

Question 1: Based on your initial impressions, and your experience of dating apps, write a brief description of the person (or people) who made this profile.

Question 2: Following on from the description you have given, who do you think the information given in the lower portion of the profile (such as height or body type) refers to? [Choice “One Person”, “Two People” or “Other”].

Question 2(a) [If “Other” selected]: If you selected Other, please specify.

Question 2(a) [If “One Person” selected]: Which person do you think this information refers to? What suggests this to you?

Question 2(a) [If “Two People” selected]: What suggests this to you? How do you think the person/people making the profile chose what to select in each category?

Question 2(b) [If “Other” selected]: What suggests this to you? How do you think the person/people making the profile chose what to select in each category?

Question 3: Looking specifically at the HIV Status and Test History categories, what do you think the information given in this profile tells you about the sexual health of the person/people behind the profile?

Profile 4

Question 1: Do you think Ben would update the Test History section of his profile to include his most recent test (i.e. the test where the Gonorrhoea was detected)? [Choice: “Yes”, “No” or “Other”].

Question 1(a) [If “Other” selected]: If you selected Other, please specify.

Question 1(a) [If “Yes” selected]: What do you think would lead Ben to make this decision?

Question 1(a) [If “No” selected]: What do you think would lead Ben to the decision not to change the date?

Question 1(b) [For all choices]: Would your response differ if Ben also planned to change other parts of his profile (for example, if he planned to change his Body Type to "Average")?

Question 2: Do you think Ben would mention his Gonorrhoea infection elsewhere in his profile? [Choice: “Yes”, “No” or “Other”].

Question 1(a) [If “Other” selected]: If you selected Other, please specify.

Question 1(a) [If “Yes” selected]: Where do you think Ben will mention this and what do you think he will say?

Question 1(b) [If “Yes” selected]: If Ben does mention this in his profile, do you think he would also mention it in person when meeting someone for sex?

Question 1(c) [If “Yes” selected]: Would your answer to the previous question be different if Ben hadn't mentioned the Gonorrhoea in his profile?

Question 1(a) [If “No” selected]: If Ben didn't mention this in his profile, do you think he would then go on to mention it if he was arranging to meet up with someone for sex?

Question 1(b) [If “No” Selected]: Would your answer to the previous question be different if Ben had mentioned the Gonorrhoea in his profile?

Profile 5

Question 1: Why do you think Ari has decided not to complete the HIV status section in his profile? What are your views on his decision not to do so?

Question 2: What do you think Ari would do in these circumstances?

Question 3: Imagine that, instead, Charlie sent the same message after he and Ari had hooked-up. Do you think Ari would respond differently in any way?

Question 4: If Ari chose to disclose his HIV status when Charlie messaged him after the hook-up, what do you expect Charlie's reaction would be? Describe any thoughts you think he would have and anything you think he would do.

Additional Information

Question 1: Before this survey were you aware that having an undetectable viral load prevents people from passing the HIV virus on during sex? [Choice: "Yes", "No" or "Other"].

Question 1(a) [If "Other" selected]: If you selected Other, please specify.

Question 2: Which dating apps have you ever had an account with? [Multi-Choice: "Grindr", "Hornet", "Jack'd", "Scruff", "Chappy" and "Other"].

Question 2(a) [If "Other" selected]: If you selected Other, please specify.

Question 3: How long have you been using dating applications?

Question 4: Do you have any final comments to add?

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